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In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

BRIEF FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
REX E. LEE,
Assistant Attorney General,
LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
BENJAMIN W. MINTZ,
Associate Solicitor for Occupational Safety and Health,
MICHAEL H. LEVIN,
Counsel for Appellate Litigation,
JUDITH A. BURGHARDT,
Attorney,
Department of Labor,
Washington, D.C. 20210.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

In No. 75–748, the opinion of the court of appeals *en banc* (Irey Cert. App. 1a–23a)[1] is reported at 519

[1] "Cert. App." references are to the appendices incorporated in the respective petitions for a writ of certiorari in these cases. "J.A." references are to the Joint Appendix filed in this Court.

F. 2d 1215. The panel opinion of the court of appeals (Irey Cert. App. 1b–26b) is reported at 519 F. 2d 1200. The opinion and order of the Occupational Safety and Health Review Commission (Irey Cert. App. 1c–8c) are reported at 4 OSAHRC 1. The opinion and order of the Review Commission's administrative law judge (Irey Cert. App. 1d–21d) are reported at 4 OSAHRC 8.

In No. 75–746, the opinion of the court of appeals (Atlas Cert. App. 1a–27a) is reported at 518 F. 2d 990. The opinion and order of the administrative law judge (Atlas Cert. App. 1b–13b), which became the Review Commission's opinion and order by operation of law, are reported at 3 OSAHRC 19.

JURISDICTION

In No. 75–748 the judgment of the court of appeals was entered July 24, 1975 (Irey Cert. App. 24a–25a). On October 14, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 21, 1975, and the petition was filed on that day. On March 22, 1976, the petition was granted, but limited to the Seventh Amendment issue (see J.A. 40a–41a).

In No. 75–746 the judgment of the court of appeals was entered September 8, 1975 (Atlas Cert. App. 28a–29a). The petition for a writ of certiorari was filed on November 21, 1975, and was granted to the same limited extent on March 22, 1976.

These cases were consolidated by the order granting certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory procedures by which the Occupational Safety and Health Review Commission assesses limited civil penalties, as part of its duty under the Occupational Safety and Health Act of 1970 to resolve contested cases and direct abatement of working conditions found hazardous, deny respondent employers any right to the civil jury trial guaranteed by the Seventh Amendment "in suits at common law."

STATUTES INVOLVED

The Occupational Safety and Health Act of 1970 is reprinted at Irey Cert. App. 1e–31e. The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

1. THE STATUTORY SCHEME

The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.* (OSHA), was passed to alleviate the "drastic" national problem of work-related deaths and injuries with a view to assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651; *National Realty and Construction Co.*

v. *Review Commission*, 489 F. 2d 1257, 1260–1261 (C.A.D.C.).[2] The Act neither alters nor addresses

[2] See, *e.g.*, *Southern Railway Co.* v. *Review Commission*, slip op. pp. 10–11 (C.A. 4, No. 75–1055), decided Feb. 9, 1976, rehearing denied June 23, 1976, petition for a writ of certiorari filed July 23, 1976; *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, 511 F. 2d 864, 870 (C.A. 10); *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F. 2d 230, 233 (C.A. 5); *Brennan* v. *Review Commission and Gerosa, Inc.*, 491 F. 2d 1340 (C.A. 2); *Brennan* v. *Review Commission and Interstate Glass Co.*, 487 F. 2d 438, 439 (C.A. 8).

The Senate Report stated that: "The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today. * * * 14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes. In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. This "grim current scene" * * * represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958." S. Rept. No. 91–1282, 91st Cong., 2d Sess. 2 (1970); Leg. Hist. 142. See also H.R. Rept. No. 91–1291, 91st Cong., 2d Sess. 14–15 (1970); Leg. Hist. 844–845 ("The issue of the health and safety of the American working man and woman is the most crucial one in the whole environmental question * * * the worst problem confronting American workers").

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited herein as "Leg. Hist.").

traditional private obligations between employers and employees relating to injuries actually caused by unsafe or unhealthy conditions. *Ibid.*, 489 F. 2d at 1260, n. 6; Section 4(b)(4), 29 U.S.C. 653(b)(4). Instead, it creates a new statutory duty to avoid maintaining such conditions, 29 U.S.C. 654(a) (1) and (2), applicable to all nongovernmental employers whose business affects commerce. The law is enforced by the Secretary of Labor through a self-contained administrative mechanism whose central features are speedy, expert and uniform resolution of contested cases by the independent Review Commission, subject to the usual appellate review. 29 U.S.C. 651 (2), (3) and (10), 652(5), 657(a), 658–661. See, generally, *National Realty and Construction Co.* v. *Review Commission, supra*, 489 F. 2d at 1261–1264; *Brennan* v. *Winters Battery Mfg. Co.*, 531 F. 2d 317 (C.A. 6), certiorari denied, No. 75–1162 (May 24, 1976); *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027, 1030 (C.A. 2).

Under the Act's expedited enforcement procedures, the Secretary's inspectors are authorized to conduct safety and health inspections at reasonable times and in a reasonable manner at places of employment. 29 U.S.C. 657(a). If, upon inspection or investigation, the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, proposing a reasonable time for its abatement, and (in his discretion) proposing a civil monetary penalty. 29 U.S.C. 658, 659.

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The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*, see 29 U.S.C. 666 (i) and (j)), and is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463–464, 470 (Sen. Javits), 471–472 (Sen. Dominick), 853; *Brennan* v. *Review Commission and Interstate Glass Co., supra,* 487 F. 2d at 441, 443. Cf. *National Independent Coal Operators' Assoc.* v. *Kleppe,* 423 U.S. 389, 401. Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666 (a)–(c) and (j). The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final Commission order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Justice Department for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine, but unlike civil administrative enforcement entails no explicit abatement requirement. 29 U.S.C. 666(e).

If an employer wishes to contest the citation or the

proposed abatement period or penalty, he must notify the Secretary within 15 working days, otherwise the citation, the abatement period and assessment as proposed become final. 29 U.S.C. 659(a). If the employer contests, the Secretary's proposed abatement order is automatically stayed and no final order directing correction of the violations is entered until proceedings before the Commission are concluded. 29 U.S.C. 659 (b), 666(d). Upon the filing of an employer contest, an evidentiary hearing is held before an administrative law judge of the Occupational Safety and Health Review Commission, an agency independent of the Secretary created to "carry out adjudicatory functions under the Act" and composed of three members with six-year terms, qualified to review contested citations and assess penalties "by reason of training, education or experience." 29 U.S.C. 651(3), 659(c), 661, 666(i); see Irey Cert. App. 4b, n. 3. At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement period and proposed penalty, and the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to "the size of the business of the employer * * *, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(i). The judge's decision becomes the Commission's final order unless within thirty days a Commissioner directs that it be reviewed.

29 U.S.C. 659(c), 661(i); see 29 CFR 2200.90 and 2200.91.[3]

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. 29 U.S.C. 660(a). The Secretary similarly may seek review of Commission orders, 29 U.S.C. 660(b), but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). If the cited employer fails timely to contest a citation or to petition for court of appeals review, the Secretary is empowered to ensure abatement by seek-

[3] Contrary to petitioners' suggestion (Br., n. 4), neither the Act nor the Review Commission assumes that employer contests are "solely for delay" or that an express Commission finding of good faith is required to protect contesting employers from retroactive nonabatement penalty assessments. The Act presumes good-faith contests, and to our knowledge neither the Secretary nor the Commission has ever attempted to impose such a retroactive penalty. Any such attempt would have to be commenced by a separate citation, contestable before the Commission and subject to the same review as any other citation and proposed penalty assessment. See 29 U.S.C. 659(b), 666(d); *Lake Butler Apparel Co.* v. *Secretary of Labor*, 519 F. 2d 84, 86–87 (C.A. 5).

The Commission's statutory power to increase proposed penalties to accord with the evidence fully adduced at hearing (Pet. Br., n. 5) has been repeatedly affirmed by lower courts and is not before the Court. 29 U.S.C. 659(c), 666(i); see *Dan J. Sheehan Co.* v. *Review Commission*, 520 F. 2d 1036, 1042 (C.A. 5), certiorari denied, No. 75–747 (March 22, 1976); *California Stevedore and Ballast Co.* v. *Review Commission*, 517 F. 2d 986 (C.A. 9).

ing a summary judicial decree, enforceable by contempt, in the court of appeals. 29 U.S.C. 660(b); see Irey Cert. App. 3a. If the cited employer abates but fails to pay the penalty finally assessed by a Commission order, the Act provides for a civil collection action in federal district court, in which neither the fact of violation nor the propriety of the penalty assessed may be retried. 29 U.S.C. 666(k); see Leg. Hist. 1220; Irey Cert. App. 2a–4a.

2. THE FACTS

Petitioners were separately cited by the Secretary and ordered immediately to abate pertinent hazards after inspections of their respective worksites conducted in 1972 revealed that each had violated a mandatory occupational safety standard and in each case an employee's death had resulted (Irey Cert. App. 10d–12d; Atlas Cert. App. 6b–10b).[4] Petitioners timely contested these citations and were afforded

[4] 29 U.S.C. 654(a)(2) requires all employers affecting interstate commerce to "comply with occupational safety and health standards promulgated under this chapter." Petitioner Irey was cited for a civil willful violation of 29 CFR 1926.652(b) and Table P–1, which require the sides of trenches in "unstable or soft material" to be "shored, * * * sloped, or otherwise supported by means of sufficient strength to protect the employees working within them." The Secretary proposed a penalty of $7,500 for this violation and ordered it abated immediately (J.A. 6a–7a, 10a–17a). Petitioner Atlas was cited for a serious violation of 29 CFR 1926.500(b)(1) and (f)(5)(ii), which require that roof opening covers be "so installed as to prevent accidental displacement." See also 29 CFR 1926.502(b). The Secretary proposed a penalty of $600 for this violation and ordered it abated immediately (J.A. 26a–30a).

hearings before Review Commission administrative law judges. The judges and Commission affirmed the violations and accompanying abatement requirements and assessed petitioner Irey a reduced civil penalty of $5,000 and petitioner Atlas the civil penalty of $600 which the Secretary had proposed.[5] Petitioners thereupon sought judicial review in the courts of appeals for the Third and Fifth Circuits, challenging both the Review Commission's violation-findings and the constitutionality of the Act's enforcement procedures.

3. THE COURTS OF APPEALS' DECISIONS

a. On review of the Commission's *Irey* decision a panel of the court of appeals for the Third Circuit affirmed, with one dissent, the constitutionality of the Act's enforcement scheme.[6] While the employer had

[5] The Review Commission summarily affirmed the judge's decision in *Irey* (Irey Cert. App. 1c). It did not grant discretionary review to petitioner Atlas and the judge's order (Atlas Cert. App. 13b) became the Commission's by operation of law. See 29 U.S.C. 661(i).

[6] The panel unanimously dismissed the contention that the civil penalties authorized by the Act were actually criminal fines necessitating a jury trial under Article III of the Constitution and the Sixth Amendment, holding that congressional intent to create a civil sanction was clear and "we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy" (Irey Cert. App. 7b–9b, 14b). See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. The panel also upheld the Act's requirement that an employer contest a citation to prevent its becoming final, finding no deprivation of due process where an employer is given "adequate opportunity for a hearing at a time when deprivation can still be averted" (Irey Cert. App. 9b–10b). See *National Independent Coal Operators' Assoc.* v. *Kleppe*, *supra*. Finally, the panel affirmed the existence of the substantive safety violation charged by the Secretary and found by

not expressly claimed a Seventh Amendment right to jury trial, Judge Gibbons in dissent concluded that the Seventh Amendment applied to Review Commission penalty assessments and required that an opportunity for trial *de novo* before a jury be afforded penalized employers. He would accordingly have found that the Act's failure to provide for a jury trial at any stage rendered its civil penalty provisions constitutionally infirm (Irey Cert. App. 13b–26b). This conclusion was premised on Judge Gibbons' characterization of the proceeding before him as one in which "the only relief sought was the recovery of an *in personam* money judgment" (Irey Cert. App. 24b) and was drawn from an historical analysis purporting to show that only equitable, *in rem,* or admiralty civil penalty proceedings fell outside the traditional realm of "suits at common law" necessitating a Seventh Amendment jury trial. The panel majority *inter alia* rejected it because "the differences between *in rem* and *in personam* actions are [not] sufficient to distinguish the thrust of * * * [this Court's]" precedents upholding administrative imposition of civil penalties after due process notice and hearing as prescribed here (Irey Cert. App. 8b, n. 11).

On rehearing *en banc* directed to this previously unbriefed Seventh Amendment issue (Irey Cert. App. 2a–9a), the court concluded (four judges dissenting)

the Commission, but reversed the administrative finding that Irey acted "willfully" and remanded the case to the Commission for further proceedings to determine whether that violation was willful or "serious" (*compare* 29 U.S.C. 666(a) *with* 666 (b) and (j)) under the proper "legal standard" (Irey Cert. App. 11b–13b).

that enforcement actions under the Act are "administrative adjudications," that this "Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage" (Irey Cert. App. 8a). The majority relied, *inter alia,* on *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49; *Curtis* v. *Loether*, 415 U.S. 189, 194; and *Pernell* v. *Southall Realty,* 416 U.S. 363, 383. Judge Gibbons for the dissenters suggested the majority was abdicating its role as "final arbiter" of the Constitution by failing to "define the limits" of administrative adjudications (Irey Cert. App. 13a, 14a), adhering to his belief that under *Jones & Laughlin* Congress could only transfer traditionally jury-free equitable proceedings to an administrative agency and that the instant enforcement proceeding was an action for debt which would have required a jury trial at common law. The majority responded that it was not deferring to Congress but this Court, which had recently reaffirmed its holding in *Jones & Laughlin* that the Seventh Amendment is generally inapplicable to administrative adjudications. Since the majority found the discretionary agency back pay awards in *Jones & Laughlin* constitutionally indistinguishable from discretionary civil penalties in their impact on the employer (Irey Cert. App. 8a–9a), it held the Act safely within present Seventh Amendment limits on Congressional action, and refrained from attempting broadly to determine those limits for all time.

b. On review of the Commission's *Atlas* order the court of appeals for the Fifth Circuit unanimously rejected the employer's identical claim to a Seventh Amendment jury trial, holding (Atlas Cert. App. 25a):

> Where adjudicative responsibility rests only in the administering agency, "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." *Curtis* v. *Loether* * * *.

The court also found unpersuasive the distinction between *in rem* and *in personam* actions urged by Judge Gibbons, indicating that to adopt it "would produce the absurd spectacle of Congress—having full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license * * *—being denied the power to prescribe [a similar mechanism to impose] a money fine * * *" (Atlas Cert. App. 25a–26a).[7]

[7] The court also declined to hold the Act's civil penalties criminal in nature, unanimously concluding that those penalties are remedial rather than punitive and serve as a "reasonable adjunct" to the Act's primary purpose of securing the speedy abatement of dangers threatening employees (Atlas Cert. App. 12a–25a). It additionally held that the employer's opportunity to be heard before any detriment is suffered obviated due process objections to the Act's contest procedure, and affirmed the agency's fact-findings in all other respects (Atlas Cert. App. 26a–27a).

Shortly thereafter the court addressed the Seventh Amendment contention again, noting: "It has long been recognized that it is well within the powers of Congress to entrust the enforcement of statutory rights to an administrative process and limit the par-

The other courts of appeals which have passed on this issue have uniformly (and without a dissent) agreed with these results. *Beall Construction Co.* v. *Review Commission,* 507 F. 2d 1041 (C.A. 8); *Brennan* v. *Winters Battery Mfg. Co., supra; Clarkson Construction Co.* v. *Review Commission,* 531 F. 2d 451 (C.A. 10). See also *Underhill Construction Corp.* v. *Secretary of Labor,* 526 F. 2d 53, 57, n. 10 (C.A. 2).[8]

ARGUMENT

INTRODUCTION AND SUMMARY

The claim in this case is that the Seventh Amendment affords an alleged violator a right to trial by jury when the government seeks to assess against him any of the civil monetary penalties provided by the Occupational Safety and Health Act of 1970. It is not suggested that the statute itself interposes a civil jury; on the contrary, it is conceded that Congress, by confiding the factual determination to an administrative tribunal and prescribing limited judicial

ticipation of the Courts by the substantial evidence standard. * * * The administrative proceedings under OSHA present no unusual features that would cause us to deviate from this rule." *Lake Butler Apparel Co.* v. *Secretary of Labor, supra,* 519 F. 2d at 88–89 (citations omitted).

[8] The Seventh Amendment issue has also been raised in the Fourth and Second Circuits. *Dorey Electric Co.* v. *Review Commission et al.*, C.A. 4, No. 74–2181 (pending decision); *Floyd S. Pike, Electrical Contractor, Inc.* v. *Review Commission et al.*, C.A. 4, No. 75–1314 (pending decision); *Mohawk Excavating Inc.* v. *Review Commission et al.*, C.A. 2, No. 76–4068 (pending argument). The Fourth Circuit has indicated it will await this Court's decision before deciding the two cases before it (orders of April 5, 1976).

review, has deliberately withheld any right to jury trial. Accordingly, petitioners must rely exclusively on an alleged constitutional imperative. This brings us at once to the Seventh Amendment.

The Amendment "preserve[s]" the right of trial by jury "in suits at common law" involving more than twenty dollars. The critical question, of course, is whether the proceeding to enforce the Occupational Safety and Health Act is a "suit at common law." We submit it is not. The reason, one is tempted to say, is simply that the *administrative* character of the proceeding removes it from the category of "suits at common law" which alone are subject to the Seventh Amendment's jury trial guarantee. Indeed, this short answer is strongly supported by *dicta* in the most recent decisions of the Court, where it is suggested that Congress may avoid "the strictures" of the Amendment with respect to disputes otherwise embraced by the Amendment merely by assigning the fact-finding function to an administrative agency "where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty,* 416 U.S. 363, 383; *Curtis* v. *Loether,* 415 U.S. 189, 194–195. But, as petitioners point out, there remains the question what kind of disputes constitutionally can be removed from the courts to agencies. We assume some limits are imposed by the Seventh Amendment,[9] and we believe it our duty to attempt to define the line, at least insofar as it affects the present case.

[9] So saying, we do not in the least enter the debate whether Congress might abolish the inferior federal courts or withdraw

There are several possible approaches to the question. Fortunately, because of the restricted argument advanced by petitioners and the limited grant of certiorari, we need not explore them all in this brief. It is unnecessary here to consider constitutional limitations, if any, not rooted in the Seventh Amendment, which may affect the propriety of administrative resolution of private disputes traditionally adjudicated by admiralty courts or courts of equity. See *Crowell* v. *Benson,* 285 U.S. 22, 48–54. We are concerned only with an alleged Seventh Amendment bar and, in the context of this case, it is enough if we overcome that obstacle. For it is not suggested in this Court that, the Seventh Amendment aside,[10] there is any constitutional question about the sufficiency of the administrative process provided for implementing the Occupational Safety and Health Act. Accordingly, the petitioners must first establish that neither the character of the parties nor the nature of the dispute involving governmental enforcement of a regulatory program excludes it from the umbrella of the Seventh Amendment. Should they succeed, they must still show

much of their present jurisdiction *without establishing alternative federal forums.* To the extent that can be done and judicial business is thereby transferred to State courts, the result, it is true, would be to avoid the strictures of the Seventh Amendment, which is inapplicable to the States (see p. ~~70~~ 80, *infra*).

But it is a wholly different question how far Congress, while continuing to exercise *federal* power to decide disputes, may, by changing the federal forum, exempt adjudication from the right of trial by jury.

[10] Because of the limited grant of certiorari, we are excused from discussing the claim advanced under the Sixth Amendment.

that the congressional *choice of forum* does not permissibly avoid the bite of the Amendment. And, even then, they must establish that this specialized and generally equitable cease-and-desist scheme is subject to the Amendment. But if, as we primarily submit, the character of the parties itself puts the matter beyond the reach of the Amendment, that is an end of the challenge.

Our approach, then, is to look first at the Seventh Amendment to determine whether it encompasses our case. There is a persuasive argument (which we explore as an alternative ground) that the case sounds in equity rather than law and for that reason escapes the Amendment. But we believe there is a more fundamental ground. It is this: that the Seventh Amendment is concerned only with *private* litigation and has no application whatever to the resolution of disputes between the citizen and his government.

The focus of the Seventh Amendment on private disputes is plainly revealed in the history surrounding its adoption. In our submission, that is dispositive. To be sure, the exact boundaries of the category that encompasses "suits at common law" is not frozen as of 1791, now including many actions created by statute. See *Curtis* v. *Loether, supra,* 415 U.S. at 193–194. But it is surely beyond debate that a distinction so fundamental as that between public and private litigation, if made by those who framed the Amendment, must be observed today.

1. As indicated, our first and primary argument (pp. 19–61, *infra*) is that the Seventh Amendment was

never intended to control government litigation of *any kind*, in *any forum*. We reach this conclusion after examining the post-Revolution State Constitutions (most of which contain provisions guaranteeing jury trial in civil cases), the debates on the subject in the State conventions which ratified the federal Constitution, together with the civil jury trial amendments many of those conventions recommended, and, finally, the debates in the First Congress which framed the Bill of Rights, and especially the first draft of the Seventh Amendment as proposed by Madison. What emerges, with perhaps surprising clarity, is that the concern that provoked the adoption of the Amendment, revealed in the various model texts, was confined to *private* litigation. In our submission, this historical evidence is conclusive. Nevertheless, in deference to contrary assumptions apparently indulged by most authorities over the last two centuries—perhaps including this Court—we proceed to explore narrower grounds of decision.

2. In a second argument (pp. 61–~~81~~ 82, *infra*), we suggest that, even if the Seventh Amendment applies to government suits to collect civil penalties when a judicial forum is chosen, Congress is free, in this area, to avoid the delays and potential inconsistencies inherent in jury trials by confiding the fact-finding process to an administrative agency. While the Court has indicated that the same Congressional discretion is available with respect to at least some private disputes, we confine our submission to governmental enforcement of monetary penalties in the implementation of a regulatory program. This very narrow proposition is, we show, wholly consistent with the jurisprudence of the Court since its beginning.

3. Finally (pp. ~~81–88~~ 83–89, *infra*), invoking *Katchen* v. *Landy*, 382 U.S. 323, we suggest that the agency created to adjudicate these cases is like a specialized statutory court of equity which can exercise summary jurisdiction over otherwise jury-triable issues if the interposition of a jury would dismember the statutory scheme. That analogy is justified, we say, because the Review Commission's primary task is to grant or deny permanent injunctive relief respecting alleged safety and health violations endangering workers, to which the discretionary power to impose limited civil monetary penalties is integral.

I. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE THE GOVERNMENT IS A PARTY

The language of the Seventh Amendment is ambiguous. What are "suits at common law"? It is no use pondering those words in the abstract. Nor does it help to turn to England whence the expression comes. For, there, "common law" has been used to describe many different things. To Lord Coke, "common law" was a kind of constitutional law. For others, it distinguishes unwritten law from statute law, whether in the criminal or civil arena. Sometimes, the reference is simply to a category of forum, the "common law courts." Or, regardless of the forum, the words may connote a form of procedure. Our own primary submission is that, in the Seventh Amendment, "suits at common law" means private actions of a certain kind,

as contrasted with governmental litigation which involves "public law."

But whether we are right or wrong is not demonstrable by reference to dictionaries, to English cases or commentators, or even to the disparate practices in colonial America. For our part, we confine ourselves to a time nearer the framing of the Seventh Amendment and to those documents and debates that are known to be in the direct line of descent. That, in our view, is the only safe path to uncovering the original understanding of the Amendment.

A. THE HISTORICAL EVIDENCE

As is well-known, the Seventh Amendment was framed in response to a prevalent concern that existing rights of trial by jury in civil cases might be abolished or abridged by the new national government.[11] See *Colgrove* v. *Battin,* 413 U.S. 149, 152–156.

[11] Some of those who criticized the original Constitution for lacking any civil jury provision did not stop at portraying *federal* courts acting without juries: they also seemed to fear that Congress might override State law providing for jury trial in *State* courts. See, *e.g.*, George Mason in the Federal Convention, 1 Schwartz, *The Bill of Rights: A Documentary History* (1971), p. 438; Richard Henry Lee in his Letters of the Federal Farmer, 1 Schwartz 472–473; the anonymous author of the Letters of Brutus, 1 Schwartz 508–510; and see Edmund Randolph's reply to Patrick Henry in the Virginia ratifying convention, 2 Schwartz 778, 786.

The same concern is evident in the amendment proposed by the minority of the Pennsylvania ratifying Convention, which would secure civil jury trial (in specified cases) "as well in the federal courts, as in those of the several States." 2 Schwartz 658. (Whenever possible, we have cited to the reprint of the original documents in Professor Schwartz' very useful two-volume compilation. In each case, he indicates the more traditional source from which he has borrowed his text.)

The difficulty, or pretended difficulty, which prevented inclusion of a civil jury provision in the original Constitution was the variety of different State practices. *Id.* at 153. But it was never suggested that the Constitution should do more than *preserve* civil jury trial rights as they were recognized in State law. Accordingly, a survey of then effective State constitutional provisions dealing with trial by jury in civil cases must give us a strong indication of the boundaries of the concern.

1. Between 1776 and 1783, each of the fourteen original States,[12] except Rhode Island and Connecticut, drafted new constitutions, and all but two of these revolutionary charters (the exceptions being those of New York and South Carolina) contained a provision guaranteeing the right to trial by jury in certain civil cases. The question is, what cases? The vague generalities of the New Jersey [13] and Maryland provisions [14] tell us nothing. Nor do the ambiguous articles

[12] For present purposes, we include Vermont which, though not officially admitted to the Union as a separate State until 1791, had declared its independence from New York by ordaining a constitution on July 8, 1777.

[13] The relevant provision of Article XXII of the New Jersey Constitution of 1776 is as follows: "* * * the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." 1 Schwartz 260.

[14] Article XVIII of the Maryland Declaration of Rights of 1776, which prefaced the new Constitution of that date, provides: "That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people." 1 Schwartz 281. While the words "by jury" are omitted, they are understood.

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of the Georgia Declaration of Rights.[15] They do not expressly include government litigation and, at all events, plainly did not furnish the model for the Seventh Amendment. Indeed, New Jersey and Georgia suggested no amendment to the federal Constitution and Maryland's proposal was much more restricted than its vague constitutional provision might suggest.[16] We turn, accordingly, to the civil jury guarantees in the constitutions of the remaining six States.

We begin with the Declaration of Rights with which Virginia prefaced her new Constitution of 1776. It is first in time and generally considered first in importance as the model for the Bill of Rights, whose prime author was of course James Madison of Virginia, himself a minor participant in the drafting of the Declaration.[17] The relevant provision of that charter (Article 11) is in the following words (1 Schwartz 235):

> That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred.

This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt

[15] For the presumptively relevant provisions of the Georgia Constitution of 1777, see Articles XL–XLIV thereof in 1 Schwartz 298.

[16] See n. 29, p. 28, *infra*.

[17] See 1 Schwartz 230, 236–237, 250. The primary draftsman was George Mason. *Id.* at 232, 247, 250. Indeed, Mason's first draft of the civil jury provision is *verbatim* the same as the final version. See Art. 10 thereof, reproduced in *id.* at 243.

to describe disputes to which the government is a party. Arguably, the category of "controversies respecting property" is more open-ended. The more natural reading, however, is that it encompasses only private actions *in rem*, or *quasi in rem*, as distinguished from personal actions. It is not a formula which easily encompasses actions initiated by the government, certainly not the collection of monetary penalties. But we need not finally construe the words "controversies respecting property" since this clause of the Virginia provision (unlike the description "suits between man and man") was left aside by Madison when he drafted the Seventh Amendment. See pp. 31–32, *infra*.

In sum, the civil jury provision in the Virginia Declaration, on its face, is one limited to private litigation. Considering the distinguished members of the committee responsible for its drafting, this cannot be supposed to be inadvertent. If need be, we have confirmation in the 1776 convention's rejection of Jefferson's more inclusive proposals,[18] and Virginia's adherence to its formula through all the constitutional debates a decade later.[19] We must conclude that the

[18] Jefferson's suggested jury trial provisions, in relevant part, were these: "All facts in causes, whether of Chancery, Common, Ecclesiastical, or Marine law, shall be tried by a jury * * *"; and "All Fines and Amercements shall be assessed * * * by the verdict of a jury." 1 Schwartz 244.

[19] See the text of the civil jury amendment to the federal Constitution proposed by Virginia, quoted at p. 30, *infra*.

Virginia Declaration of 1776 deliberately confined the right to jury trial in civil cases to private actions.[20]

Nor was Virginia an exception to the general rule. In five other States, significantly including Pennsylvania and Massachusetts,[21] comparable constitutional provisions with respect to civil jury trials were adopted. In language as plain as Virginia's, each of them confined the guarantee to private suits, as the following texts sufficiently show:

Pennsylvania (Declaration of Rights of 1776, Art. XI, in 1 Schwartz 265)—

> That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.

North Carolina (Declaration of Rights of 1776, Art. XIV, in 1 Schwartz 287)—

> That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

[20] Even within that area, it should be noted, the constitutional mandate was deemed subject to exceptions, according to Edmund Randolph, who had been a member of the drafting committee and was writing after having served as Governor of Virginia, delegate to the Philadelphia Convention, and Attorney General of the United States. See his Essay reproduced in 1 Schwartz 248.

[21] The pre-eminence of Virginia and Massachusetts, and to a lesser extent Pennsylvania, in our early constitutional history is well known. They were in fact the three most populous States, whose Representatives in the First Congress accounted for more than a third of the whole, who could together block any congressionally sponsored constitutional amendment. See U.S. Constitution, Art. I, Sec. 2, cl. 3; Art. V.

Vermont (Declaration of Rights of 1777, Art. XIII, in 1 Schwartz 324)—

> That, in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury; which ought to be held sacred.

Massachusetts (Declaration of Rights of 1780, Art. XV, in 1 Schwartz 342)—

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high-seas, and such as relate to mariners wages, the legislature shall hereafter find it necessary to alter it.

New Hampshire (Bill of Rights of 1783, Art. XX, in 1 Schwartz 378)—

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners wages, the legislature shall think it necessary hereafter to alter it.

2. From these models for the federal Bill of Rights, we go to the Constitutional Convention in Philadelphia. There, as we know, apparently no one suggested inclusion of a jury trial guarantee in civil cases until very late. That cannot have been an oversight in light of the number of delegates who had played a part in

framing the State Constitutional texts we have just examined. We need only notice George Mason (as we have seen, the acknowledged prime author of the Virginia Declaration of Rights), Benjamin Franklin (who had presided over the Pennsylvania Convention of 1776) [22] and Nathaniel Gorham (a member of the committee that drew up the Massachusetts Declaration of Rights of 1780).[23] What is more, since Article III authorized the establishment of federal trial courts with a very wide civil jurisdiction, there was no escaping the question whether Congress should, or should not, be left free to withhold a right to a jury for these cases.[24] The mandate of jury trial for federal criminal trials included in the same Article must obviously have prompted any forgetful delegate to urge a like provision for civil cases, if that had been his intention. Nor was the disparity of State practices a real obstacle to formulating a constitutional rule to be uniformly applied in the *federal* courts—which, in the end, is what the Seventh Amendment did.

[22] See 1 Schwartz 275.

[23] See *id.* at 356, 359.

[24] Although the argument was later advanced that such a provision was "unnecessary" (*e.g.*, Hamilton in *The Federalist* No. 83), that proposition is demonstrably unsound when addressed to Congressional power over procedure in the lower *federal* courts, unless one simply meant, as one speaker put it, that "[t]he Representatives of the people may be safely trusted in this matter." See *Colgrove* v. *Battin*, *supra*, 413 U.S. at 153, n. 8. Here, unlike the area covered by the First Amendment, it was not even arguable that Congress lacked power in the absence of an express prohibition.

We must conclude that the omission of a civil jury guarantee in the original Constitution was a decision deliberately taken. When the matter was broached in the last days of the Convention, difficulties were interposed which were obviously exaggerated. The very brief debates, fully reproduced in this Court's *Colgrove* opinion, 413 U.S. at 153–154 n. 8, sufficiently show the prevailing mood of the delegates, every State without exception rejecting a civil jury trial amendment to Article III.[25]

3. This, of course, is not the end of the story. Resistance to the proposed Constitution developed and, as the Court noted very early, "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford*, 3 Pet. 433, 445. That complaint was voiced in most of the State ratifying conventions. But, significantly, in all the reported debates, not a single speaker, so far as we are able to discover, related the demand for preserving the civil jury to governmental litigation. Indeed, one suspects the civil jury trial issue was often invoked merely as an easy weapon with which to assault the Constitution,[26]

[25] See A. T. Mason, *The States Rights Debate: Antifederalism and Constitution* (1964), pp. 74–76.

[26] The absence of a civil jury provision made an effective argument because the defenders of the proposed Constitution could not successfully explain why they had deemed it necessary to include an express jury trial guarantee for criminal cases but omitted a corresponding guarantee for civil cases, except with the unsatisfactory excuse of disparate State practices.

obnoxious to many of the antifederalists on more fundamental grounds.[27] At all events, the focus of the concern with private lawsuits is fully revealed in the civil jury right amendments suggested by several States.

Including the unofficial minority report from the Pennsylvania Convention, there were seven such proposals. The civil jury amendments recommended by New York [28] and Maryland [29] are perhaps ambiguous. But the rest clearly deal with private cases only. Thus, Massachusetts, second in importance only

[27] See Mason at 95–97 and 101, n. 178.

[28] The amendment proposed by New York is as follows (2 Schwartz 913): "That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate."

[29] The principal amendment on civil jury trial proposed by the Maryland Convention is as follows (Art. 3, 2 Schwartz 732): "That, in all actions on debts or contracts, and in all other controversies respecting property, of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the state courts, in such cases, have a concurrent jurisdiction with the federal courts, with an appeal from either, only as to matter of law to the Supreme Federal Court, if the matter in dispute be of the value of — dollars." Although that language may be deemed ambiguous as to whether it includes more than private litigation, it plainly was *not* intended to embrace "cases of revenue," probably then supposed to exhaust the category of federal government litigation. "Revenue" cases are separately dealt with, without mention of jury trial, in Article 4 of the proposed amendments, which, in relevant part, is as follows (2 Schwartz 733): "and there may be an appeal, in all cases of revenue, as well to matter of fact as law; and Congress may give the state courts jurisdiction of revenue cases, for such forms, and in such manner, as they may think proper."

to Virginia and the first State to recommend amendments to the new Constitution, suggested the following provision:

> In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.[30]

This express limitation to diversity cases—exclusively private litigation—is obviously deliberate. The Massachusetts ratifying Convention—unlike some others—did not merely put forward the provision from its own Declaration of Rights: it fashioned new language, tailored to the new federal jurisdiction defined in Article III. But it did not attach jury trial to all such cases. Most relevantly, the drafters of the proposal exempted from trial by jury the whole category of "controversies to which the United States shall be a party," a jurisdiction which everyone conceded as appropriately given to the new federal courts.[31]

The New Hampshire Convention proposed identical

[30] 2 Schwartz 713.

[31] To be sure, this provision also omitted other categories of federal cases from the jury trial guarantee. Suits between American citizens and aliens, or foreign ambassadors, ministers and consuls, were presumably left out because of the fear that the jury would favor its own national. The exclusion of "federal question" cases probably reflects the view that causes of action created by written laws were not suits "at common law," which, alone, were meant to be embraced. That "common law" limitation of course explains the omission of "cases of admiralty and maritime jurisdiction."

language.[32] The remaining proposals, by the Pennsylvania minority,[33] Virginia[34] and North Carolina,[35] in the definition of the civil cases to which a right to trial by jury is secured, followed the familiar language of their own Constitutions: "controversies respecting property, and * * * suits between man and man." We have already shown that this formulation encompasses only private litigation.

The critical significance of these texts cannot be exaggerated. What they reveal is that no State ever suggested that the Federal Constitution should require jury trial in government litigation. On this issue, even the most dedicated antifederalists were content to guarantee the right to a civil jury in private cases only. Accordingly, it would be most extraordinary if the Seventh Amendment which emerged from these proposals should have been intended to have a wider scope.

4. But there is more evidence still. It is well known that the Federalist majority in the First Congress

[32] 2 Schwartz 761. The New Hampshire Convention, concluding its work in June, 1788, no doubt had before it the Massachusetts civil jury provision adopted in early February, and copied it. Like Massachusetts, New Hampshire did not propose the language of its own Declaration of Rights for inclusion in the Federal Constitution. Compare p. 25, *supra*.

[33] 2 Schwartz 658.

[34] 2 Schwartz 841.

[35] 2 Schwartz 967. In the case of North Carolina, the proposed amendment to the Federal Constitution now added the words "and in suits between man and man," omitted from its constitutional provision. Compare p. 24, *supra*. This confirms our reading of the earlier guarantee as comparable to the Virginia formula.

was less than enthusiastic about devoting its time to framing the Bill of Rights. It was done, with little debate and almost carelessly, only because some—especially Madison—deemed it right and politic to carry out pledges given.[36] But neither Madison—the acknowledged chief draftsman—nor any of his associates, were inclined to go beyond what was necessary to placate the opposition. It is clear the Bill of Rights proposal which the Congress ultimately framed went *no further* than what the State ratifying conventions had asked for. Indeed, in important respects, the recommendations were not implemented and many antifederalists were disappointed.[37]

The Seventh Amendment is certainly no exception. Together with other Articles of the Bill of Rights, a draft of the civil jury trial amendment was proposed by Madison in the House of Representatives during its first sitting. We must assume Madison had consulted the several proposals submitted by other States, but, quite naturally, he modelled his draft on the provision recommended by his native Virginia, which he had helped frame.[38] It was in these terms:

> In suits at common law, between man and man, the trial by jury, as one of the best securities to

[36] See Mason 92–97; 2 Schwartz 983–984.

[37] See, *e.g.*, the reports of the Virginia Senators, Richard Henry Lee and William Grayson, in 2 Schwartz 1186–1187, and letters describing the views of Patrick Henry in 2 Schwartz 1189, 1191–1192. See also Mason 96–97.

[38] See 2 Schwartz 765, 1007, 1008. Madison had been a member of the committee at the ratifying convention which drafted the proposed amendments. *Id.* at 839.

> the rights of the people, ought to remain inviolate.[39]

Once again, it is clear no more than private litigation was embraced. Had the words "between man and man" not later been dropped, the present debate would be foreclosed. But they *were* deleted and we must attempt to determine whether the change was meant to expand the scope of the provision.

Madison read his proposed amendments on June 8, 1789. In a very temperate speech,[40] he explored all the political and other reasons for acquiescing in what he termed a "moderate * * * revisal" of the Constitution.[41] But the House refused to interrupt other business to consider his proposals. There were speeches in opposition to any amendment;[42] from all sides, there were pleas for delay;[43] and there were arguments about procedure.[44] In the end, consideration was postponed without any debate on the particular proposals.[45] Six weeks later, when the matter came up again, the House reversed its previous decision and appointed a select committee, comprising one member from each of the then represented States.[46] It was in

[39] *Id.* at 1028.
[40] *Id.* at 1023–1034.
[41] *Id.* at 1025.
[42] *Id.* at 1017–1019, 1034–1036, 1039–1040, 1040–1041.
[43] *Id.* at 1017–1019, 1020, 1021, 1022, 1036, 1039.
[44] *Id.* at 1017, 1021, 1022–1023, 1034, 1038, 1040, 1041–1042.
[45] *Id.* at 1042.
[46] *Id.* at 1050, 1054, 1057–1061, Rhode Island and North Carolina had not yet ratified the Constitution and were therefore not represented. Vermont was not yet recognized as a separate State.

that committee that the text of the Seventh Amendment was shortened by deleting the words "between man and man."

The civil jury proposal reported by the Committee of Eleven (as it came to be called) read as follows:

> In suits at common law, the right of trial by jury shall be preserved."[47]

When we compare this provision with Madison's draft, it is obvious the committee was condensing and sharpening language. The florid phrase "as one of the best securities to the rights of the people" is deleted as surplusage. And the shorter and more direct mandate "shall be preserved" is substituted for "ought to remain inviolate." We suggest the omission of the words "between man and man" served a like purpose: stylistic improvement only, not change of substance.

Unfortunately, we have no record of the proceedings of the Committee of Eleven. But we are not without some indication whether that body intended to extend the coverage of the proposed amendments. We know that the committee completed its work very rapidly, in a single week.[48] Although they were required also to consider the State proposals that were omitted from Madison's draft,[49] it is obvious the

[47] 2 Schwartz 1117. Except for the later insertion of the twenty dollar limitation and the addition of the second clause by the Senate (see p. 39, n. 62, *infra*), this is, of course, the final text of the Seventh Amendment.
[48] 2 Schwartz 1050, 1054, 1061.
[49] *Id.* at 1061.

members decided to confine their work to improving that draft. As Professor Schwartz has said:

> It is fair to say that the Committee version made no substantial alteration in the original Madison draft. The Committee did, however, make certain stylistic changes which brought the amendments closer to the final Bill of Rights version. The most important of these are: the direct use of the term "freedom of speech, and of the press"; the change to what was to be language of the Just Compensation Clause of the Fifth Amendment; the use of almost the exact language ultimately contained in the Ninth Amendment; and the adoption of the substance of what was to be the language of the Seventh Amendment. These changes scarcely alter the fact that the Committee version was a virtual restatement of the amendments proposed by Madison.[50]

In sum, there is no reason to believe the Committee of Eleven did more than condense and sharpen the language of the original draft. Certainly, with respect to the provision that became the Seventh Amendment, the Committee had no reason to go further, since, as we have seen, no State had proposed a broader civil jury trial provision. Moreover, to the extent that State practices differed, or that some jury trial proposals were more encompassing than others, the normal course of political compromise suggests that Congressmen would have settled on the narrow common ground. This, of course, was all the more appropriate

[50] *Id.* at 1050.

in writing a *constitutional* rule—which could always be expanded by subsequent legislation.

Our conclusion is confirmed when we look at the membership of the select committee. Many were declared Federalists,[51] and all but one of the others [52] were supporters of the unamended Constitution.[53] And, even if any member had sought to widen the scope of the proposed amendments, it is sure that the committee as a whole, under the influence of Chairman Vining, Madison and Sherman—its only prominent men—would have rejected such an effort. Indeed, some two weeks after the committee draft of

[51] Madison aside, the avowed Federalists were Abraham Baldwin of Georgia, Nicholas Gilman of New Hampshire, George Clymer of Pennsylvania, and Benjamin Goodhue of Massachusetts. See *Biographical Dictionary of the American Congress, 1774–1971* (G.P.O. 1971) pp. 544, 756, 1005, 1014.

[52] Aedanus Burke of South Carolina, who, after the report of the committee, repeatedly sought to have the House accept further amendments. See 2 Schwartz 1103, 1109, 1114, 1117, 1128.

[53] Besides Madison, there were: Roger Sherman of Connecticut, who had signed the original Constitution; George Gale of Maryland and Elias Boudinot of New Jersey, each of whom had supported the Constitution in their respective State ratifying conventions (see 2 Schwartz 729, 736, 737, 674; *Biographical Dictionary, supra*, at 615, 980, 1689); Egbert Benson of New York, a political ally of Hamilton, described as "a zealous advocate of the adoption by his state of the draft from the Philadelphia Convention" (2 *Dictionary of American Biography* (1929), p. 204; Main, *The Antifederalists* (1961), p. 48); and, finally, John Vining of Delaware, the chairman of the committee, who early expressed his hostility to any amendment (see 2 Schwartz 1022–1023).

The stance of the several committee members is perhaps sufficiently revealed in their votes—all opposed except Burke—on the motion to amend what is now the Tenth Amendment by adding the word "expressly" before "delegated." See 2 Schwartz 1124, 1127.

the amendments had been reported, Aedanus Burke of South Carolina, the only antifederalist member, complained (2 Schwartz 1103):

> I am very well satisfied that those [amendments] that are reported and likely to be adopted by this House are very far from giving satisfaction to our constituents; they are not those solid and substantial amendments which the people expect; they are little better than whip syllabub, frothy and full of wind, formed only to please the palate; or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage. In my judgment, the people will not be gratified by the mode we have pursued in bringing them forward. There was a committee of eleven appointed; and out of the number I think there were five who were members of the convention that formed the constitution. Such gentlemen, having already given their opinion with respect to the perfection of the work, may be thought improper agents to bring forward amendments. Upon the whole, I think it will be found that we have done nothing but lose our time, and that it will be better to drop the subject now, and proceed to the organization of the Government.

No doubt, Mr. Burke was overstating the case. We do not suggest that the Seventh Amendment, as it emerged from the Committee of Eleven, was mere "whip syllabub." But it would be equally unjustifiable, in our view, to claim that the Committee had transformed a limited guarantee of jury trial in private

civil cases into a strong shield against governmental oppression.

5. Finally, it is instructive to notice what happened after the Committee of Eleven had completed its work. The House began consideration of the draft amendments on August 13, but the whole of that day was consumed with pleas for postponement and a long debate whether the proposed changes should be incorporated into the body of the Constitution (as the committee, supported by Madison, suggested) or appended as separate provisions (as Sherman insisted was necessary and proper).[54] In the ensuing days, the House, first sitting as a committee of the whole and then in legislative session, considered each of the proposals in turn.[55] Significantly, in every other case, changes in the text of the committee draft were urged, whether successfully or not.[56] But, not so with respect to the civil jury provision: both in commit-

[54] See 2 Schwartz 1062–1075. On the question of form, Madison prevailed (*id.* at 1075), but only for the time being. Sherman won his argument a week later (*id.* at 1126).

[55] 2 Schwartz 1076–1138.

[56] While the House sat in committee of the whole, changes were suggested in the draft provisions that were to become the First Amendment (2 Schwartz, 1088–1107), the Second (*id.* at 1107–1110), the Third (*id.* at 1110), the Fourth (*id.* at 1112), the Fifth (*id.* at 1110–1112), the Sixth (*id.* at 1112–1113, 1114, 1116–1117), the Eighth (*id.* at 1111–1112), the Ninth (*id.* at 1112), and the Tenth (*id.* at 1118). In plenary session, further changes were proposed to the amendments which are today the First (*id.* at 1126), Second (*id.* at 1126–1127) and the Tenth (*id.* at 1127–1132).

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tee [57] and in the plenary session,[58] the draft was adopted without debate and without suggestion of change. Nor did anyone question, or explain, why the committee had shortened the language of the Madison draft. The inference is strong that the two versions were accepted as carrying the same meaning.

The remaining stages in the adoption of the Seventh Amendment may be taken briefly. After a small committee of the House had re-arranged the surviving amendments as new articles to be added to (rather than incorporated in) the Constitution, and that work had been formally approved, the proposals were sent to the Senate.[59] We know little of what happened there because the debates were not then public and the Journal records only the action taken. But, considering their action on other proposed amendments, that body [60] cannot be supposed to have approved a civil jury trial provision which was understood as going further than what the States had suggested. The Senators did not hesitate to cut back other provisions and even to delete the two criminal jury proposals.[61] Indeed, they did limit the applica-

[57] The proposal, then described as "the 3d clause of the 7th proposition," was, according to the Annals of Congress, "considered and adopted," without further ado, on August 18. 2 Schwartz 1117.

[58] In the House, sitting legislatively, the proposal is recorded as having been "adopted without debate" on August 21. 2 Schwartz 1127.

[59] See 2 Schwartz 1125, 1138.

[60] See *id.* at 1145–1147.

[61] *Id.* at 1145–1146, 1147. The House had framed two separate amendments guaranteeing trial by jury in criminal cases, the first inhibiting *State* action (Article 11, 2 Schwartz 1123), the other

tion of the civil jury amendment by adding the twenty dollar provision.[62] We assume they would have added other restrictive language if they had thought the provision as written reached more than private "legal" cases.

When the Senate's changes reached the House, they were not all agreed to and a conference became necessary.[63] The House did, however, immediately accept the Senators' twenty dollar limitation on civil jury trial [64] and we therefore have no interest in the further proceedings in the Conference and in the two houses.[65] We note only that Madison was the chief Manager on behalf of the House at the Conference,[66] and, that, despite the additional opportunities afforded, neither he nor any member of the House or Senate suggested any change in the text of the Seventh Amendment, presumably because the present revision was deemed no different in substance from Madison's original draft. And the same remark can be made with respect to the ratification of the Amendment by the several States, all agreeing to the civil

governing prosecutions by the *national* government (Article 14, *id.*). Both were deleted in the Senate (*id.* at 1149, 1150, 1154, and see Madison's letter to Pendleton, *id.* at 1157), but the second was ultimately restored (*id.* at 1159, 1160, 1162, 1163–1165).

[62] *Id.* at 1146–1147, 1150, 1154. Consistent with its effort to consolidate the House amendments into a lesser number, the Senate added the second clause—formerly a separate article—to the Seventh Amendment. *Id.* at 1154.

[63] *Id.* at 1154, 1155, 1162.

[64] *Id.* at 1160.

[65] *Id.* at 1162–1166.

[66] *Id.* at 1162.

jury provision without apparently suspecting that it might later be read to reach further than the proposals that some of those States had recommended to Congress.[87]

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6. We have sought to show, primarily by reference to the texts which served as models for the Seventh Amendment, that those who framed that provision never meant to burden government litigation with the requirement of jury trial, *as a matter of constitutional imperative*. It is a fair question, however, how this accords with the apparent lesson of recent colonial history. Was not the main impetus for the Seventh Amendment, as petitioners suggest (Pet. Br. 20–31), a desire to interpose a civil jury between the citizenry and the government's judges? Our answer is that there is not a shred of evidence supporting the argument. To be sure, it is familiar history that, in the decade before Independence, Americans inveighed against the practice of assessing and enforcing fines and forfeitures through so-called "vice-admiralty" courts without juries. That is sufficiently reflected in public remonstrances from 1765 through 1776.[88] But it does not

[87] See *id.* at 1171–1203. Connecticut, Georgia and Massachusetts, having failed to act before the requisite number of ratifications had been filed, did not formally ratify the Bill of Rights until 1939. See 2 Schwartz 1172, 1201, 1203.

[88] See, e.g., the Stamp Act Congress' Declaration of Rights and Grievances (Arts. VII and VIII, in 1 Schwartz 195, at 197); John Adams' argument in *Sewall* v. *Hancock* (Pet. Br. 28–29); Samuel Adams' declaration of The Rights of the Colonists and a List of

follow that the Seventh Amendment was a response to that concern.

Whether rightly or wrongly, the members of the federal Constitutional Convention deemed the criminal jury provision of Article III (later reinforced by the Sixth Amendment) a sufficient constitutional shield against a repetition of governmental oppression during the colonial period. As Hamilton explained in No. 83 of *The Federalist*:

> I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas-corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

The same thought was repeated in at least some of the State ratifying conventions. We need only notice what

Infringements and Violations of Rights (1 Schwartz 199, at 209); (Preamble, Res. 5 and Res. 11, in 1 Schwartz 214 at 215, 217, 218); the Declaration and Resolves of the First Continental Congress the Continental Congress' Address to the Inhabitants of Quebec (1 Schwartz 221, at 222–223); and the Declaration of Independence (1 Schwartz 251, at 253).

was said by Mr. Gore in the Massachusetts Convention [69] and by Governor Randolph in that of Virginia.[70]

It may be objected that these remarks are somewhat disingenuous in that they ignore the possibility of national officials—like their British predecessors—wishing to by-pass juries in *civil* proceedings to collect revenue and enforce customs, trade and immigration regulations. Why did not the Founding Fathers deem it necessary to guard against that danger?

In part, the answer must lie in the fact that we were now our own rulers, not colonials rebelling against a distant and arbitrary Crown and Parliament, and the

[69] 2 Schwartz 691, 692:

"Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury;

* * * *

"Gentlemen have compared the article under consideration to that power which the British claimed, and we resisted, at the revolution; namely, the power of trying the Americans without a jury. But surely there was no parallel in the cases; it was criminal cases in which they attempted to make this abuse of power."

[70] 2 Schwartz 786–787:

"The trial by jury is supposed to be in danger also. It is secured in criminal cases, but supposed to be taken away in civil cases. It is not relinquished by the Constitution; it is only not provided for. Look at the interest of Congress to suppress it. Can it be in any manner advantageous for them to suppress it? In equitable cases, it ought not to prevail, nor with respect to admiralty causes: because there will be an undue leaning against those characters, of whose business courts of admiralty will have cognizance. I will rest myself secure under this reflection—that it is impossible for the most suspicious or malignant mind to show that it is the interest of Congress to infringe on this trial by jury."

recalcitrance of citizens during the Revolutionary War had taught the Framers the practical necessities of effective government. Even without a constitutional restraint, we would not oppress our own citizens. As Randolph put it, "Why distrust ourselves?" [71] Moreover, an independent judiciary with life tenure was now provided for and the abuses of judges removable at whim by the Crown were no longer to be feared. And, finally, as speakers said many times,[72] this was a matter for legislation, not to be frozen in the Constitution. We may invoke James Iredell, later a member of this Court, speaking to the North Carolina ratifying convention (2 Schwartz 941):

> Gentlemen will be pleased to consider that there is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing that ought not to be done often. When regulated by law, it can easily be occasionally altered so as best to suit the conveniences of the people.

The Seventh Amendment does not represent a complete reversal of that view—else it would have been much more controversial. It dealt only with that private litigation where a civil jury had been traditional, which the federal courts might now entertain by virtue of the diversity jurisdiction. All other cases, in-

[71] 2 Schwartz 786.

[72] See, *e.g.*, 2 Schwartz 691, 693, 940.

cluding the new field of litigation involving the federal government, were left to be provided for by legislation. Jefferson,[73] apparently almost alone, would have written a broader provision. But, as we have already noted, it was not such radicals who framed the Seventh Amendment. Fidelity to the original understanding does not permit us to read the present text in total disregard of the very limited objective of those who wrote it.

B. THE FIRST JUDICIARY ACT

A further objection to our reading of the Seventh Amendment is said to lie in the provisions of the First Judiciary Act which recognize a right to jury trial in "suits for penalties and forfeitures." (Pet. Br. 23). It is said that, since the members of the First Congress who wrote the Judiciary Act were the framers of the Amendment, it is reasonable to treat the one as construing the other. And decisions of this Court are cited in support of that course (Pet. Br. 22). The flaw in the argument is the assumption that Congress acted as a matter of *constitutional compulsion.*

[73] We have already noticed the more comprehensive jury trial provisions in Jefferson's draft for a Virginia Declaration of Rights in 1776—not adopted by the State Convention. See p. 23, n. 18, *supra*. Apparently, Jefferson never wavered in that view. See his letter to Madison of December 20, 1787 (1 Schwartz 605, at 607); his letter to C.W.F. Dumas, 1788 (1 Schwartz 613); and his letter to Madison of August 28, 1789, criticizing the latter's draft bill of rights and suggesting a more inclusive civil jury provision (2 Schwartz 1140, at 1143). But, as we know, Jefferson was absent in Paris during all the relevant constitutional debates and his suggestions were not taken up.

Strictly speaking, of course, the Seventh Amendment did not come into force until two years after the Judiciary Act became law.[74] Moreover, while the Amendment was framed in the House, the statute was written in the Senate, where the political balance was somewhat different.[75] Nevertheless, it is reasonable to suppose the Congress as a whole would not have passed a law which they deemed inconsistent with a constitutional provision they were recommending to the States. But there is no inconsistency. Neither the Seventh Amendment nor any other clause of the Constitution barred the national legislature from going further in the matter of civil jury trials than was

[74] The Judiciary Act, having been passed by the Senate on July 17, 1789 (1 Annals of Congress 50) and by the House, without amendments, on September 17 (*id* at 894), was signed into law by the President on September 24 (1 Stat. 73, 93). The Seventh Amendment, together with the other Amendments constituting the Bill of Rights, was not ratified by the requisite number of States until December 15, 1791 (2 Schwartz 1172, 1202).

[75] When the Judiciary Act was passed by the Senate there were only twenty Senators sitting, North Carolina and Rhode Island not having yet ratified the Constitution and the Senators from New York not having yet been seated. See 1 Annals of Congress 49, 50. Of these, only seven were elected as Federalists (Bassett of Delaware, Carroll of Maryland, Ellsworth of Connecticut, Elmer of New Jersey, Paterson of New Jersey, Strong of Massachusetts, and Wingate of New Hampshire, see *Biographical Dictionary*, *supra*, 562, 710, 911, 912, 1514, 1769, 1944). Others, including Grayson and Lee of Virginia, were hostile to a strong federal government. See p. 34, n. 37, *supra*. The majority were moderates and their acquiescence in the establishment of inferior federal courts with substantial jurisdiction may well have required a broad jury trial guarantee.

constitutionally required. In the absence of evidence, it would be quite wrong to conclude the Congress was providing trial by jury only where it believed it must.

The legislative history of the Judiciary Act provides no such proof. On the contrary, there are indications the other way. At no point in the recorded debates,[76] was it suggested that the Congress was according civil litigants a right of trial by jury as a matter of constitutional compulsion. And, although making a different point, one speaker expressed what may well have been the general understanding, that actions authorized by federal statutes were not suits at "common law.'"[77]

What is more, the very text of Section 9 of the Act (on which petitioners rely) supports that view. That section not only gives a right to trial by jury in penalty and forfeiture cases, but, also—and quite separately—in "all suits at common law where the United States sue." Presumably, the drafters did not consider penalty and forfeiture actions "suits at common law"—else there was no reason separately to provide for them.[78] If that is so, it must follow that the right to a jury in such actions was given as a matter of legislative grace, not constitutional mandate, since the Seventh Amendment controls only "suits at common law."

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[76] We have only a portion of House debates. See 1 Annals of Congress 782–785, 796–820, 820–834.

[77] See 1 Annals of Congress 808 (1789).

[78] We note that the distinction remains in the Judicial Code today. See 28 U.S.C. 1345, 1355. And see 28 U.S.C. 1340, separately conferring jurisdiction in tax cases.

These provisions, it is true, may be invoked to show that at least *some* litigation initiated by the government was viewed as encompassed by the phrase "suits at common law." At best, however, that would suggest the narrower submission we outline in a moment; it would not avail petitioners here. But, in fact, this Court has settled that the expression "suits at common law" in the Seventh Amendment has a narrower scope than the same words in the Judiciary Act.

When we look at Section 11 of the Act[79]—which defines the jurisdiction of the circuit courts—we notice that those courts are given competence to hear "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners." The question presented in *Kohl* v. *United States,* 91 U.S. 367, was whether this provision authorized the circuit courts to hear condemnation actions, and an affirmative answer was given on the ground that they were "suits at common law" within the statute.[80] And yet (as we discuss in a moment), it is settled that eminent domain proceedings are not controlled by the Seventh Amendment. It is thus apparent that the Judiciary Act is not a safe guide to construing the Amendment—even when the same words are used.

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[79] 1 Stat. 73, 78.

[80] At the time, there was no separate jurisdictional provision for eminent domain cases. The first predecessor to the present 28 U.S.C. 1358 was not enacted until 1888. See "Legislative History" note to that section in U.S. Code (1970 ed.), vol. 7, p. 7576.

There is, finally, a further indication, on the face of the text, that the Judiciary Act was more generous in the matter of jury trials than the Constitution required. Indeed, the first clause of Section 9 grants the district courts a very limited criminal jurisdiction, specifying, *inter alia*, that no fine shall exceed one hundred dollars nor any term of imprisonment exceed six months, and the last clause of the section provides for jury trial in such cases. Yet, neither Article III nor the Sixth Amendment reaches such petty offenses.[81] Once again, therefore, Congress went beyond the constitutional mandate. And if it did so in criminal cases, is it not probable it acted likewise in civil?

To be sure, it may seem strange that a Congress dominated by Federalist sentiments should go so far beyond what was (or soon would be) constitutionally mandated. But it is not really remarkable that, while balking at *constitutionalizing* trial by jury too broadly, the legislature should be willing, perhaps only experimentally, to be more generous in a repealable statute. After all, the debate on the Bill of Rights had in large part focused on congressional power. Many had opposed constitutional amendments that would restrict discretion, while at the same time arguing that the Congress could be trusted to reach the same result legislatively.[82]

[81] See *Baldwin* v. *New York*, 399 U.S. 66, 68–69; 18 U.S.C. 1; Mag. R., Rule 3(c)(1).

[82] See, *e.g.*, Hamilton in *The Federalist*, No. 83.

The written record is too meager to reveal the motives of the First Congress. But there are very plausible explanations for its different treatment of jury trial in the Judiciary Act and the proposed Sixth and Seventh Amendments. Perhaps the members of the House and Senate were conceding here, for the time being, what they thought expedient to encourage ratification of the Constitution by the two reluctant States of North Carolina and Rhode Island and to conciliate strong feelings elsewhere. Or it may be that the concession of jury trial in most civil cases and all criminal cases was part of a political compromise in which this was the price exacted from the advocates of a broad federal jurisdiction by those who opposed investing the lower federal courts with more than a very minimal authority.[83] We must remember that, when it came to enacting the Judiciary Act, the anti-federalists were in a much stronger position than they were on the question of amending the Constitution. It was now they who could delay the legislation until concessions were made. And, on the other hand, their proposals could not be blocked—as in the case of constitutional reform—by a mere one-third of the members.

We need not pursue the matter. It is plain enough, in our submission, that the jury trial provisions of

[83] Judging from the debates in the House, there was, indeed, considerable opposition to creating lower federal courts or investing them with more than admiralty jurisdiction. See 1 Annals of Congress 783–785, 796–797, 801–804, 812, 813–815, 820–821, 822–827, 829–831, 832–833 (1789).

the First Judiciary Act tell us no more about the scope of the Seventh Amendment than they do about the Sixth. We do not say that the inclusion of the broad jury trial provision in Section 9 proves that the Constitution itself did not mandate that result. On the other hand, it is hardly evidence to the contrary: to label the provision wholly superfluous is not the best compliment to the First Congress.

C. THE DECISIONS OF THIS COURT

1. No doubt, it will be said that our argument is contrary to the judgment of this Court in *Parsons* v. *Bedford,* 3 Pet. 433. But that would be a gross overstatement. *Parsons* was an ordinary private lawsuit for the price of goods sold and delivered. And the only necessary holding was that, the facts having been tried by jury, the second clause of the Seventh Amendment (which is *not* involved here)[84] precluded this Court from reviewing them. Accordingly, the disregard of a local law, apparently applicable to federal courts sitting in the State, which required the testimony of witnesses to be recorded, was, in effect, harmless error. Plainly the decision in *Parsons* does not remotely clash with our submission.

There is, to be sure, a further ruling that the action in *Parsons* was a "suit at common law" within the meaning of the Seventh Amendment. But the opinion itself seems to treat this as unnecessary to the

[84] "* * * and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common Law."

result, on the ground that the second clause of the Amendment is a "substantial and independent clause" (3 Pet. at 447)—a statement which, in context, suggests a view that no federal court may re-examine facts found by jury, whether or not a jury trial was mandated by the first clause of the Amendment.[85] And, in any event, that ruling, whether necessary or not, is no embarrassment to our argument. The Court merely concluded that a private suit on a debt, which elsewhere would be a classical common law action, does not escape the Seventh Amendment simply because it arises in Louisiana where the "civil law" obtains. We do not quarrel with that proposition.[86]

Unfortunately, however, in reaching this conclusion the Court indulged in rather sweeping language. It was first said that the expression "suits at common law" in the Seventh Amendment was to be read as equivalent to the words "all cases in law" in Article III, and therefore as embracing all controversies not of equity or admiralty jurisdiction. 3 Pet. at ~~436~~ 447. 446 And the Court went on to notice the provisions of the

[85] This appears to be an open question in this Court. The opinion in *The Justices* v. *Murray*, 9 Wall. 274, while emphasizing the independence of the two clauses in ruling that the second clause governs this Court in reviewing the decisions of State courts—where jury trial is not constitutionally required—nevertheless seems to assume that the prohibition applies only to cases that *would be* governed by the Seventh Amendment if tried in a federal court. *Id.* at 279. But see *Colgrove* v. *Battin*, *supra*, 413 U.S. at 152, n. 6.

[86] Indeed, it it were otherwise, after *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, the Seventh Amendment would presumably have no application whatever to diversity cases in federal courts sitting in Louisiana.

Judiciary Act that provide for jury trial of all cases not in equity or admiralty. 3 Pet. at 447. It is these passages which petitioners invoke.

Read uncritically, this portion of the *Parsons* opinion does, indeed, support petitioners. But too much is made of Mr. Justice Story's words. In the context of *private* litigation—which is all he was dealing with—the argument may be unexceptionable. It would be wrong, however, to suppose the Court was purporting to announce a rule controlling the enforcement of governmental regulations. There is, as it happens, an indication to the contrary in the opinion itself. Explaining that the Seventh Amendment does not govern admiralty cases, Mr. Justice Story gives, as one reason, that they involve an admixture of "public law." 3 Pet. at 447. Is that not, at the least, a hint that the Court understood governmental litigation to be outside the sweep of the Seventh Amendment?

At all events, we submit the Court ought not be bound by the casual *dictum* of the *Parsons* opinion, delivered in a case where the present issue did not arise and was not argued. And, for the same reason, the Court, in our submission, is free to disregard subsequent repetitions of that *dictum*. See, *e.g.*, *Capital Traction Company* v. *Hof*, 174 U.S. 1, 8–10; *Ross* v. *Bernhard*, 396 U.S. 531, 533; *Curtis* v. *Loether*, 415 U.S. 189, 193. In none of the cited cases was the quoted passage from *Parsons*, if construed to reach government litigation, necessary to the result.

2. There is, in fact, no decision of this Court which squarely controls our submission. We must acknowledge, however, that the Court appears often to have assumed the contrary. Indeed, there are at least two cases in which the opinion explicitly concedes the application of the Seventh Amendment to a suit by the United States to collect a civil penalty. The first of these is *Hepner* v. *United States*, 213 U.S. 103, in which it is said that "[t]he defendant was, of course, entitled to have a jury summoned." *Id.* at 115. The other decision is *United States* v. *Regan*, 232 U.S. 37, where the Court notes that "the defendant was entitled to have the issues tried before a jury" because "in a civil action of debt involving more than twenty dollars a jury trial is demandable." *Id.* at 47.

We stress, however, that these statements were not strictly necessary to the decision. In both *Hepner* and *Regan*, the claim advanced, and rejected by this Court, was that guarantees applicable to *criminal* prosecutions—immunity from a directed verdict of conviction or proof beyond a reasonable doubt for conviction—should have obtained because the government's action for a monetary penalty alleged violation of criminal statutes. And the Court's comments about a right to trial by jury were gratuitous, a jury trial having in fact been afforded in each case. Moreover, it seems plain that point was never at issue.

Nevertheless, it is not without hesitation that we ask the Court to repudiate the assumption underlying *Hepner* and *Regan*, and perhaps other cases. We do so only because it appears that the Court has never been presented with the evidence which would afford it the opportunity to test that assumption.

However long acquiesced in, a proposition of constitutional law which has not been fully considered ought to be open to re-examination. See, *e.g.*, *Williams* v. *Florida*, 399 U.S. 78, 86–103; *Apodaca* v. *Oregon*, 406 U.S. 404, 407–410 (opinion of White, J.). Cf. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 379–388, 403–405.

3. It may be, moreover, that our submission affords a firmer basis for the decisions of this Court dealing with the mode of trial in civil controversies involving the national government. The Court has always recognized the constitutional propriety of resolving such controversies without the intervention of a jury. But an apparent distinction has been drawn between suits *against* the sovereign, where jury trial has been held unnecessary *regardless* of the forum, and, on the other hand, proceedings in which the government is seeking to collect a monetary award, where, it seems to be assumed, the judicial or administrative character of the forum selected constitutionally determines whether the citizen may insist on jury trial. The rationale for that distinction is not self-evident, and it, of course, becomes unnecessary if we are right in submitting that the Seventh Amendment has no application whatever to government litigation.

We turn, first, to the well-settled rule that suits against the United States, although seeking a monetary award and filed in the ordinary courts,[27] are exempt from the strictures of the Seventh Amendment. Why should it be so, if (contrary to our submission) the Amendment generally applies to government litigation?

The principal rationale given in the cases is that, because of the prevailing doctrine of sovereign immunity, such proceedings were unknown to the common law and thus "are not suits at common law within [the] true meaning [of the Amendment]." *McElrath* v. *United States*, 102 U.S. 426, 440; *Galloway* v. *United States*, 319 U.S. 372, 388; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572. But there is, perhaps, a more fundamental reason for the rule.

After all, the common law, if understood to encompass everything not equity or admiralty and to be capable of legislative amendment, always had power to waive the bar of sovereign immunity. See *Glidden*

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[27] Suits against the United States in the district courts, whether under the Tucker Act, the Tort Claims Act, or the Internal Revenue Code (for a time), were tried without a jury. As a matter of legislative grace, a right of trial by jury was given in tax refund suits (see *Wickwire* v. *Reinecke*, 275 U.S. 101, 105); but other actions against the United States continue to be heard by the judge alone. 28 U.S.C. 2402. Of course, no right of trial by jury obtains in the Court of Claims (28 U.S.C. 2503, 2505), the Tax Court (26 U.S.C. 7441 *et seq.*) or the Customs Court (28 U.S.C. 2638). See *Phillips* v. *Commissioner*, 283 U.S. 589, 599, n. 9.

Company v. *Zdanok*, *supra*, 370 U.S. at 563. Are suits under the Tucker Act and the Torts Claims Act not governed by the Seventh Amendment only because those statutes were enacted after 1791? If so, the same exemption ought to obtain in any diversity suit under a more recent State Lord Campbell's Act, or any death action under the F.E.L.A. or the Jones Act, on the sole ground that the common law, unaided by statute, knew no action for wrongful death. Yet, we suppose no one suggests that result. Cf. *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 360; *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 524. One must wonder also why the United States is exempt from trial by jury when it counterclaims in a Tucker Act suit. *E.g.*, *McElrath*, *supra*. Is it really because the government claim—although entirely independent of the plaintiff's case, as it may be[*]—is "incidental," or because such a rule is necessary "to obviate the need for multiple litigation" (*Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572)? That explanation is difficult to square with the holding of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen* v. *Wood*, 369 U.S. 469.

It is said that because the sovereign is free not to be sued at all, it may condition its consent as it pleases, "declar[ing] in what court it may be sued, and prescrib[ing] the forms of pleading and the rules of practice to be observed in such suits." *McElrath*, *supra*, 102 U.S. at 440. By a parity of reasoning, it should follow that whenever Congress is constitutionally free to enforce its regulations by monetary exac-

[*] See 28 U.S.C. 1346(c), 1503, 2508.

tions without invoking the judicial power at all (see pp. 61 ff., *infra*), it may withhold trial by jury from the defendant when it *does* use the courts in such cases. But that result can be squared with the Seventh Amendment only if the Amendment does not control governmental litigation.

Even more difficult to rationalize is the proposition, now accepted (see *United States* v. *Reynolds*, 397 U.S. 14, 18–19; *Bauman* v. *Ross*, 167 U.S. 548, 593), that the Seventh Amendment gives no right of trial by jury in eminent domain proceedings. The seminal case is *Kohl* v. *United States*, *supra*, which (as we have seen) holds that, for jurisdictional purposes, a condemnation action *is* "a suit at common law, when initiated in a court." 91 U.S. at 376. But, because the Court also noted that, like many other civil "proceedings at common law," condemnation was not traditionally "enforced through the agency of a jury" (*ibid.*), Kohl has been invoked as holding that the Seventh Amendment is inapplicable. See 5 Moore's *Federal Practice*, ¶38.32 [1], pp. 243–244 (1976). We suggest a more satisfactory basis for the rule is simply that the Seventh Amendment was never intended to reach the sovereign's litigation.

4. We have already noted that, in most, if not all, cases in which the government, pursuing a legitimate legislative purpose, wishes to avoid the risks and delays of a civil jury trial in recovering money or property, that result can be achieved by the simple expedient of employing an administrative, instead of a judicial, process. There may be constitutional inhibi-

tions on confiding the adjudication of purely private disputes to administrative tribunals. But where public rights are involved—especially when government itself is directly enforcing its regulations—Congress is entirely free to rely on the administrative process without trial by jury.

There is, of course, nothing new or startling in that conclusion. As we detail in a moment (pp. 61 ff, *infra*) few propositions are more firmly settled in this Court's jurisprudence. Yet, it is not easy to reconcile such a rule with the assumption that the Seventh Amendment was meant to interpose a screen of ordinary citizens between the government and the people in civil cases. We suggest that the true reason why government may enforce its civil laws without a jury trial, even where money or property is involved, is that the Seventh Amendment has no application to such controversies, *whatever the forum*. We repeat our primary submission that, read against the history of its framing, the Amendment's preservation of the right to a civil jury in "suits at common law" is confined to private cases. In sum, we contrast "public law" and "common law."

b. Possible exceptions

We have thus far argued that the present cases are beyond the reach of the Seventh Amendment because the government is a party. If that is right, it makes an end of the matter. However, should that be deemed

too broad a rule of exclusion, one is tempted to make a somewhat narrower submission: that, regardless of the forum used, government litigation is exempt from the strictures of the Seventh Amendment only when the government is not merely standing in the same position as a private plaintiff, claiming by virtue of general law which is equally available to individuals.

The exact boundaries of the rule we now suggest are difficult to fix. But the point can be illustrated by positing the two extremes: a suit by the United States to recover for damage to one of its vehicles, invoking the ordinary law of torts; and a proceeding by the sovereign, under the revenue laws, to collect taxes. In the first case, the government is not purporting to be acting as such, but simply as any other person whose property was negligently damaged, resorting to the general law to be made whole. Notwithstanding the character of the plaintiff, this might be said to fit the description of a "suit at common law." In the revenue case, on the other hand, an exclusively governmental power is involved and the law invoked is not general or "common," but is a specially created weapon which only the sovereign is entitled to use.

This approach is perhaps suggested by the contrast made in the first Judiciary Act between government actions to exact "penalties and forfeitures" and "suits at common law where the United States sue" (see

pp. 44, 45–47, *supra*). And, today, one can arguably find the line of demarcation in Chapter 85 of the Judicial Code, which distinguishes between "ordinary" cases in which the government is plaintiff (28 U.S.C. 1345) and "special" cases, including those in which the sovereign is invoking its power of eminent domain (28 U.S.C. 1358), collecting its revenue (28 U.S.C. 1340), enforcing postal regulations (28 U.S.C. 1339), or exacting penalties and forfeitures (28 U.S.C. 1355). One obstacle, however, is that, as we have seen, the category of government "suits at common law" in the First Judiciary Act included eminent domain cases—and presumably others of what we have labelled "special cases." So, also, the present scheme of provisions defining the jurisdictions of district courts is little more than historical accident. It is not a safe basis for constitutional adjudication.

There is, moreover, a more fundamental objection to the suggested distinction. On the one side, it can be said that the government is always acting officially and, if legitimately, pursuant to powers conferred by the Constitution. Thus, in our first example, the vehicle, if a mail truck, is owned for that purpose and the recovery against a tortfeasor is authorized as an incident of the postal power, not by virtue of the common law of negligence. And, in the revenue case, it is possible to say that the government is merely suing on a debt, a classical action at common law. Those analytical difficulties lead us to prefer our primary submission—that the character of the parties alone

decides the applicability of the Seventh Amendment.

Besides, the history of the Seventh Amendment, as we have shown, strongly suggests that *all* government litigation is exempted from its strictures. And that conclusion is consistent with the discrete, but otherwise all-inclusive, category of "controversies to which the United States shall be a party" which the Constitution itself establishes." Art. III, sec. 2. We submit that is a boundary which the Seventh Amendment was never intended to cross.

II. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE CONGRESS PERMISSIBLY CONFIDED THEIR RESOLUTION TO AN ADMINISTRATIVE TRIBUNAL

We have argued (perhaps over-argued) that the Seventh Amendment has no application to litigation involving the government, regardless whether the factual determination is legislatively confided to a court or to an administrative agency. But there is an independent ground for decision of these cases, firmly established in the Court's decisions. It is this: that because Congress has permissibly determined that factual disputes arising under the Occupational Safety and Health Act shall be adjudicated by an administrative tribunal, rather than an ordinary court, the Seventh Amendment is irrelevant. The proposition has

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[89] We note also the provisions of chapter 161 of the Judicial Code (28 U.S.C. 2401–2416) which announce special rules when the United States is a party to litigation.

two parts, which we consider in turn: (1) that Congress was constitutionally free to assign to an administrative agency the resolution of these controversies; and (2) that the consequence is that jury trial need not be afforded.

At the outset, however, it may be well to make some preliminary observations. First, we wish to stress that the present argument is in no way inconsistent with our initial submission. On the contrary, the historical analysis of the Seventh Amendment, if correct, *confirms* this Court's consistent course of decisions exempting administrative proceedings from the jury trial requirement. All that we have done is to suggest an additional rationale for those results.

On the other hand, it is important to say that the two arguments are not merely opposite sides of the same coin. The submission we are now advancing is *not* limited to situations in which the government is the protagonist. That circumstance, it is true, is a sure indication that the subject matter is within the area which has been labeled that of "public rights," and we accordingly notice it here. But the character of the parties does not define the area of "public rights," as we use the term. Rather, we argue that congressional discretion to choose an administrative forum for the resolution of factual disputes depends on the fact that the subject matter is one with respect to which the legislature has plenary constitutional power. If that condition is satisfied, it is irrelevant whether the enforcement of such "public rights" is reserved to the government itself or assigned to indi-

viduals adversely affected by the violation of a regulation, or to both. A sufficient example is the workmen's compensation remedy which most States afford to the injured employee in an administrative proceeding, notwithstanding provisions in State constitutions comparable to the Seventh Amendment. See *Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 235.

If, in what follows, we emphasize the public character of the dispute and the government as enforcer, that is only because those are the features of these cases which place them well within the area of congressional discretion to use the administrative process. But we do not mean to imply that other cases would not be subject to the same rule. Precisely what other cases would properly come within the rule, we have no more occasion to explore than did the court below.

A. CONGRESSIONAL DISCRETION TO INVOKE THE ADMINISTRATIVE PROCESS

1. We notice immediately the subject-matter of these cases. The Act in question deals with public rights. It creates no private cause of action in employees, but leaves them to traditional remedies against employers under workmen's compensation or common law. 29 U.S.C. 653(b)(4); see *Byrd* v. *Fieldcrest Mills, Inc.,* 496 F. 2d 1323 (C.A. 4); *Russell* v. *Bartley,* 494 F. 2d 334 (C.A. 6); *Skidmore* v. *Travelers Insurance Co.,* 483 F. 2d 67 (C.A. 5). The Act itself is enforced exclusively by public authorities.

Nor can there be any question that the new legislation responded to an important public concern. As is

repeatedly emphasized in the Committee Reports and debates, "[t]he problem of assuring safe and healthful workplaces * * * ranks in importance with any that engages the national attention today." Leg. Hist. 142. Only comprehensive and uniformly-enforced Federal legislation could reduce the work-related carnage at which the statute was aimed (Leg. Hist. 144):

> Nor has state regulation proven sufficient to the need. No one has seriously disputed that only a relatively few states have modern laws relating to occupational health and safety and have devoted adequate resources to their administration and enforcement. Moreover, in a state-by-state approach, the efforts of the more vigorous states are inevitably undermined by the short-sightedness of others. The inadequacy of anything less than a comprehensive, nationwide approach has been exemplified by experience with the chemical betanaphtylamine—a chemical so toxic that any exposure at all is likely to cause the development of bladder cancer over a period of years. The Commonwealth of Pennsylvania discovered this extreme effect of betanaphthylamine and banned its use, manufacture, storage or handling in that State, but production of this lethal chemical has begun in another State where legislation is inadequate. The exposure of workers to betanaphthylamine continues today.
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> In sum, the chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry, nor a single state jurisdiction The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.[90]

And so, Congress, invoking its power to regulate interstate commerce, enacted this law. It is, and must be, conceded (Sixth and Seventh Amendment objections aside) that Congress acted well within constitutional bounds. The only question is whether, in exercising the plenary power granted by Article I, Congress may provide for non-judicial resolution of disputes arising under the new regulations which might, instead, be assigned to traditional courts.

2. The answer begins with *American Insurance Co.* v. *Canter*, 1 Pet. 511, from which "[t]he concept of a legislative court derives." *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 544. *Canter* involved an inferior court created by the Territorial Legislature of Florida and the question presented was whether such a court, not established under Article III, could exercise admiralty jurisdiction. Chief Justice Marshall answered (1 Pet. at 546):

> It has been contended, that by the constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall from time to time * * * establish." Hence, it has been argued, that congress cannot vest admiralty jurisdiction in courts created by the

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[90] See p. 4, n. 2, *supra*. See also, *e.g.*, Leg. Hist., 142–143, 343, 406, 413–414, 457, 512–513, 845, 854, 865, 991; *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027 (C.A. 2).

territorial legislature. We have only to pursue this subject one step further, to perceive that *this provision of the constitution does not apply to it.* The next sentence [of Art. III, sec. 1] declares, that "the judges both of the supreme and inferior court, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. *They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States.* [Emphasis added.]

While the decision, on its face, is restricted to a territorial situation in which Article III courts did not exist (1 Pet. at 546), it has long been taken as establishing Congressional discretion to place certain disputes cognizable under Article III into Article I forums and make "constitutional limitations on the exercise of judicial power * * * inapplicable," *Glidden Co.* v. *Zdanok,* 370 U.S. at 547, even if those disputes could have been resolved in judicial courts.

See, *e.g., Ex parte Bakelite Corp.,* 279 U.S. 438, 449–453, 456–457; *Crowell* v. *Benson,* 285 U.S. 22, 50–51; *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 544–552 and nn. 13, 21; *Palmore* v. *United States,* 411 U.S. 389, 400–404.

The further question of the limits on such Congressional Article I discretion was first addressed in *Murray's Lessee* v. *Hoboken Land Company,* 18 How. 272. The Court there held that the Federal Treasury could administratively determine revenue owed by a defaulting tax collector and collect it by levying on the debtor's property without invoking the judicial power. The premise of the ruling is that (18 How. at 284):

> * * *** there are matters, *involving public rights,* which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but *which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* [Emphasis added.] [91]

To the same effect is *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, a suit brought by a shipping firm to recover a money penalty exacted by the Secretary of Commerce and Labor pursuant to summary administrative fact-findings under the Immigration

[91] The panel dissent below attempted to distinguish this case on the ground it did not speak to the Seventh Amendment jury-trial issue because the right involved was fiduciary and equitable (Irey Cert. App. 19b–21b). In *Phillips* v. *Commissioner,* 283 U.S. 589, 596, Justice Brandeis, speaking for a unanimous Court,

(Continued)

Act of 1903, which prohibited shippers from importing aliens with diseases or physical defects likely to impair their ability to earn a living. In affirming the administrative imposition of a civil penalty the Court held (214 U.S. at 339):

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, *and other subjects,* has proceeded on the conception that *it was within the competency of Congress, when legislating as to matters exclusively within its control,* to impose appropriate obligations and sanction their enforcement by reasonable money penalties, *giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.* [Emphasis added.][92]

(Continued)

unequivocally rejected that characterization. In affirming Congress' use of a broader summary process to collect taxes from a tax debtor's transferees, he stated: "It is urged that the decision in the *Murray* case was based on the peculiar [fiduciary] relationship of a collector of revenue to his government. *The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.*" [Emphasis added.]

More importantly, *Murray's Lessee* held the government did not have to resort to judicial process at all in the first instance to determine and enforce its plenary public right—a result which makes inquiry into the legal or equitable nature of the proceeding if it were within an Article III forum irrelevant.

[92] Petitioners, following Judge Gibbons' panel dissent (Irey Cert. App. 14b–19b), would distinguish *Oceanic Navigation* and similar cases on the ground they involved not *in personam* proceedings but proceedings *in rem* to which the Seventh Amendment did not apply (Br., n. 22). It is not at all clear those

We next notice *Block* v. *Hirsh*, 256 U.S. 135, where the Court sustained a temporary Federal statute passed under the war power for the emergency purpose of preventing wartime housing profiteering in the nation's capital. The act suspended landlords' legal remedy of ejectment and relegated them to an administrative fact-finding forum charged with determining fair rents at which tenants could hold over despite expiration of their lease. Mr. Justice Holmes, for the majority, flatly rejected contentions that this scheme violated both parties' right to a civil jury trial, noting that while Congressional declarations of compelling public need were not conclusive on the courts (256 U.S. at 155):

> * * * circumstances have clothed the letting of buildings in the District of Columbia *with a*

proceedings were *in rem*, since the government neither seized the vessels in those cases nor executed liens on them, but simply denied the owners clearance papers until administratively-determined penalties were paid. Certainly neither the *Oceanic* Court, nor this Court subsequently, characterized those proceedings as *in rem*. Cf., *e.g.*, *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329; *Helvering* v. *Mitchell*, 303 U.S. 391, quoting and repeatedly citing *Oceanic Navigation* in support of a decision upholding an Article I scheme of administrative penalty-imposition which was clearly *in personam*.

In any event the asserted distinction is untenable. As the *Irey* panel majority concluded—correctly, we submit—"the differences between *in rem* and *in personam* actions are [in]sufficient to distinguish the thrust of such precedents as Oceanic Navigation * * * [where] the Court *refused to accept the proposition that Congress could not authorize the imposition of a penalty and commit its collection to an administrative officer without the necessity of resorting to the judicial power*" (Irey Cert. App. 8b, n. 11; emphasis added). See also Irey Cert. App. 8a.

> *public interest so great* as to justify regulation by law. * * * [W]hat in its immediate aspect may be only a private transaction may * * * be raised by its class or character to a public affair.

He continued (*id.* at 158):

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. *If the power of the Commission established by the statute to regulate the relation is established,* as we think it is, by what we have said, *this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.* While the act is in force there is little to decide except whether the rent allowed [by the Commission] is reasonable, and upon that question the courts are given the last word. *A part of the exigency is to secure a speedy and summary administration of the law,* and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision * * *. [Emphasis added.]

In *Ex parte Bakelite Corp.*, 279 U.S. 438, a unanimous Court found the old Court of Customs Appeals to be an Article I legislative court (279 U.S. at 451, 458):

> Legislative courts also may be created as special tribunals to examine and determine various matters, *arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control.* Congress may reserve to

> itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.
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> * * * * *
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> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports * * *. The full province of the court under the act creating it *is that of determining matters arising between the Government and others in the* * * * *administration and application of the customs laws.* * * * The appeals include *nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.* True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; *but this does not make the matters involved in the protests any the less susceptible of determination by executive officers.* [Emphasis added.] [93]

Of special relevance is *Crowell* v. *Benson,* 285 U.S. 22. There the Court generally sustained an adminis-

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[93] The holding of the plurality and concurring opinions in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, that the successor Court of Customs and Patent Appeals was an Article III court, does not detract from the force of these general observations. Indeed, the *Glidden* result largely rests on the conclusion that *Bakelite* misapplied its general observations, 370 U.S. at 548–552 *passim*, and as such reinforces them.

trative notice, contest and hearing scheme which was procedurally indistinguishable from OSHA's but remitted private rights cognizable in admiralty to a factfinding commission. Mr. Chief Justice Hughes, speaking for an eight-man majority, drew a sharp distinction between public and private rights. 285 U.S. at 50–58 *passim*. "As to determinations of fact," he said (285 U.S. at 50–51):

> the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. * * * [T]he Congress, in exercising the powers confided to it, may establish "legislative" courts * * * to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." * * * Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the [plenary] congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

> *The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined.* But in cases of that sort, there is no requirement that, *in order to maintain the essential attributes of the judicial power,* all determinations of fact [*even*] *in constitutional courts* shall be made by judges. [Emphasis added.]

Significantly, while the opinion went on generally to sustain administrative fact-finding even in this private-right sphere, it did so on the theory that the commission was an integral and immediate adjunct of Article III courts analogous to juries and masters, not an independent agency. 285 U.S. at 51–54. See Jaffe, *Judicial Control of Administrative Action* 88–89 (Abr. Ed., 1965). Implicit in this analysis is the assumption that where, and only where, exclusively Article III private (rather than Article I plenary public) rights are involved, the judicial institutions inherent in Article III—including a jury trial where mandated, 285 U.S. at 51—must be preserved.

Next in sequence is *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, where the Court reaffirmed the scheme sustained twenty-three years earlier in *Oceanic Navigation*. In the interim the statutory fines had been increased from $100 to $1000 per diseased immigrant, and the shipper urged that it was constitutionally entitled to trial of the facts *de novo*. The Court flatly rejected this assertion, holding (287 U.S. at 335) that "Congress may choose the administrative rather than the judicial method of imposing [fines]" if it has

"plenary" power in the sphere regulated, the fines authorized are not unreasonable or confiscatory, and due process is afforded (287 U.S. at 335–336):

> the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to control the admission of aliens, and *due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends.* * * *
>
> The action of the Secretary is, nevertheless subject to some judicial review * * *. The courts may determine whether his action is within his statutory authority * * * whether there was any evidence before him to support his determination * * * and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. [Emphasis added.]

We come, then, to the modern cases. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, the Court, speaking through Mr. Chief Justice Hughes (the author of *Crowell*), sustained the Board's power to compel reinstatement and payment of back wages by employers without the intervention of a Seventh Amendment jury. The Court rejected the contention that backpay was equivalent to a money judgment, concluding that the Seventh Amendment was inapplicable "where recovery of money damages is an incident to [non-legal] relief even though dam-

ages might have been recovered in an action at law." 301 U.S. at 48–49. That was sufficient to dispose of the contention; but the Court added, in language strikingly reminiscent of the public-right holding in *Block* v. *Hirsh, supra,* that the case was outside the Amendment because this was a "statutory proceeding" (*ibid.*):

> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. *It is a statutory proceeding.* Reinstatement of the employee and payment for time lost *are requirements* [*administratively*] *imposed for violation of the statute and are remedies appropriate to its enforcement.* The contention under the Seventh Amendment is without merit. [Emphasis added.]

Since the Chief Justice was well aware that the mere statutory status of a claim did not preclude the Amendment's application, having extensively treated the problem of mandatory trial of statutory facts in *Crowell, supra,* he could only have meant that the Board proceeding was created by Congress to regulate *public* rights.

In *Helvering* v. *Mitchell,* 303 U.S. 391, the Court sustained an enforcement scheme identical to OSHA's in both structure and the purely adjudicatory nature of the Article I forum employed. The Commissioner of Internal Revenue served Mitchell with both a notice of tax deficiency exceeding $700,000 and a proposed 50 per cent penalty for tax evasion; Mitchell unsuccessfully contested the notice and penalty by

protest and hearing before the Board of Tax Appeals; and the Court emphatically affirmed this procedure, stating that "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury." 303 U.S. at 399, 402. To be sure, the opinion explicitly deals only with the Sixth Amendment. But it is hardly conceivable that the Seventh Amendment was simply overlooked. The Court had recently held that neither in administrative tax protests prior to collection, nor alternative court suits to recover paid deficiencies, were taxpayers entitled to a jury trial as a matter of constitutional right. *Wickwire* v. *Reinecke*, 275 U.S. 101; *Phillips* v. *Commissioner*, 283 U.S. 589. The reason given was that (*Wickwire, supra*, 275 U.S. at 105–106):

> the right of the petitioner to a jury in such [an alternative] case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the [relevant statutory provision authorizing alternate suits] * * *, which has reference to a suit at law. It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial—if only the injunction against the taking of property without due process of law * * * is satisfied. *Murray's Lessee* * * *.

Finally, both *Curtis* v. *Loether*, 415 U.S. 189, and *Pernell* v. *Southall Realty*, 416 U.S. 363, confirm this analysis. *Curtis* was a statutory private action for actual and punitive damages for housing discrimination, which Congress had assigned for trial in the

ordinary district courts. In applying the Seventh Amendment, the Court reaffirmed both its holding in *Jones & Laughlin* and previous rulings that the mere statutory status of a private claim did not preclude the Amendment's application—thereby suggesting that the legislative choice of forum may be critical (415 U.S. at 194–195):

> *Jones & Laughlin* * * * stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme. *Katchen* v. *Landy*, 382 U.S. 323 (1966) * * * is to like effect. * * * These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process * * * free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights *in an ordinary civil action* in the district courts, *where there is obviously no functional justification for denying the jury trial right*, a jury trial must be available *if the action involves rights and remedies of the sort typically enforced in an action at law.* [Emphasis added.]

And in *Pernell* the Court reversed a District of Columbia Court of Appeals ruling that Congress could permissibly eliminate civil jury trials from private and traditionally legal ejectment actions it had placed in the District's courts. The basis of this reversal was

that the lower court had misapplied *Block* v. *Hirsh*, *supra* (416 U.S. at 383):

> *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. See *Curtis* v. *Loether*, 415 U.S., at 194. See also *NLRB* v. *Jones & Laughlin* * * *. We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. ***Congress has not seen fit to do so, however, but rather has provided that*** [*such statutory*] ***actions*** * * * ***be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction.*** Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial. *Curtis* v. *Loether, supra, at 195.* [Emphasis added.]

Significantly, both cases involved Congressionally-prescribed modes of enforcing private (rather than public) rights, and both recognized the existence of Congressional discretion, even here, whether or not to provide for "an ordinary civil action in the district courts." *Curtis* v. *Loether, supra,* 415 U.S. at 195; *Pernell* v. *Southall Realty, supra,* 416 U.S. at 383. We do not explore the limits of that proposition in cases involving the liability of one individual to another. But it is plain that all the cases, from *Murray's Lessee* to *Pernell,* concede absolute legislative discretion in matters of public rights, especially those in which the

government is an immediate party. That is enough to resolve the present cases.

B. ABSENCE OF JURY TRIAL IN ADMINISTRATIVE PROCEEDINGS

We noted, at the outset, that there were, in principle, two discrete questions, one as to legislative discretion to invoke the administrative process, the other as to the right to a civil jury when that choice was permissibly made. But, as the decisions just recited make abundantly clear, an affirmative answer to the first question invariably controls the second. It would be merely tiresome to repeat the pertinent language, already quoted, from *Oceanic Navigation Co., Block* v. *Hirsh, Crowell, Jones & Laughlin, Mitchell, Wickwire,* and finally, *Curtis* and *Pernell.* Those decisions, we submit, finally settle the inapplicability of the Seventh Amendment to administrative proceedings.

It remains to notice petitioners' suggestion that they seek a right to trial *de novo* before a jury *after* the completion of the administrative determination. That is, in our view, a wholly impractical plan. If "jury trials would be incompatible with the whole concept of administrative adjudication" (*Curtis, supra,* 415 U.S. at 194; *Pernell, supra,* 416 U.S. at 383)—where the proceeding is swifter and more informal, the tribunal has developed a special expertise, and uniformity of decisions is assured—how can it make sense to compel a full re-trial by jury afterwards? As has been written in this Court, "[t]he concept of a jury * * * reviewing the action of an

administrative body is contrary to settled federal administrative practice." *Cox* v. *United States,* 332 U.S. 442, 453. See also *Yakus* v. *United States,* 321 U.S. 414, 446–448.

It is of course settled that Article III judicial *review* of administrative adjudications does not implicate the Seventh Amendment if Congress' choice of initial forum was proper. All that is constitutionally required at that stage is review of the legal sufficiency of the evidence to support the facts found, not redetermination of those facts. *E.g., Lloyd Sabaudo Societa* v. *Elting, supra; Crowell* v. *Benson, supra,* 285 U.S. at 50–54; *National Labor Relations Board* v. *Jones and Laughlin, supra.* Cf., *e.g., Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. If due process required an opportunity to have a jury reexamine the facts found by an administrative tribunal in civil cases, it would logically follow that the rule of the Seventh Amendment applies to the States by virtue of the Due Process Clause of the Fourteenth Amendment. But that is not the law. See, *e.g., Walker* v. *Sauvinet,* 92 U.S. 90; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158; *Melancon* v. *McKeithen,* 345 F. Supp. 1025, 1045 (E.D. La.), affirmed, 409 U.S. 943, 1098. See also *Curtis* v. *Loether,* 415 U.S. at 192, n. 6; cf. *Alexander* v. *Virginia,* 413 U.S. 836.

This is not to say that Congress cannot decide, either by express statutory command or pertinent silence, that a particular adjudicator should afford a jury trial. See, *e.g., Webster* v. *Reid,* 11 How. 437; *Pernell* v.

Southall Realty, supra, 416 U.S. at 365–366, 374–375, 383. Cf. *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 549–551. But where, as here, Congress' intent is clearly to the contrary and it is regulating public rights within its plenary powers by invoking an administrative forum, the Seventh Amendment does not overrule the legislative decision and require that trial by jury be afforded either during the proceeding or afterwards.

Indeed, during the whole of our history, regulatory fines and penalties have been collected by non-jury procedures, pursuant to comparable legislative decisions. That practice was common during the Colonial period, for both criminal and civil penalties as high as £500. See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917, 927, 928, 930, 937, 946–947, 950, 952–963, 968 (1926).[94] The practice continued. See, *e.g., Murray's Lessee, supra; Allman* v. *United States,* 131 U.S. 31, 35; *Crowell* v. *Benson, supra,* 285 U.S. at 50–51. It is current today.[95] Indeed, a

[94] This article was researched and written to ascertain "the extent to which the Constitution compels Congress to provide jury trial in the enforcement of federal penal laws" (*id.* at 920). While primarily related to the Sixth Amendment right to jury trial, it also bears on the Seventh Amendment, since both criminal and civil proceedings could be brought to try statutory violations without a jury, and the distinction between the two forms of proceedings was then seldom made. See *id.* at 937.

[95] See, *e.g.,* 39 U.S.C. 5206 (Postal Service); 8 U.S.C. 1221(d), 1223(d), 1227(b), 1229, 1253(e), 1281(d), 1284(a), 1285–1287, 1321, 1322(a), 1322(b), 1323(a), 1323(b) (Immigration and Naturalization Service); 12 U.S.C. 1425a(d), 1425b(b) (Federal Home Loan Bank Board); 49 U.S.C. 1678 (Natural Gas Pipeline Safety Act). Cf. 30 U.S.C. 819; *National Independent Coal Operators'*

recent study, endorsed by the Administrative Conference of the United States, tells us that administrative imposition of monetary penalties has always been a feature of our government, consistently upheld by the courts. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies,* in 2 Recommendations and Reports of the Administrative Conference of the United States (July 1, 1970—December 31, 1972) 907–912, 915, 926–929. And, of course, it is now settled that even criminal fines up to at least $500 may be exacted without the intervention of a jury. *Baldwin* v. *New York, supra;* cf. *Muniz* v. *Hoffman,* 422 U.S. 454, 475–477. It would be most remarkable if, at this late date, the Seventh Amendment were followed for two centuries, or to require a civil jury trial where the Sixth Amendment would not interpose a jury if the penalties were criminal.[96] In our submissions, no such disruptive result is mandated.

Assoc. v. *Kleppe, supra,* 423 U.S. at 393 and n. 3 (Coal Mine Health and Safety Act; limited statutory *de novo* determination of propriety of penalty, but apparently not of facts establishing violation).

[96] Apart from instances of failure to abate in accord with previous orders, OSHA penalties are limited to a statutory maximum of $10,000 for willful or repeated violations, and are generally far below that due to the factors specified in 29 U.S.C. 666(i). From July 1, 1975 to April 30, 1976, penalties proposed by the Secretary averaged $617 for serious violations, $409 for repeated and willful violations, and $12 for non-serious violations (Source: Occupational Safety and Health Administration, Data Center, June 1976). See *Olin Construction Co.* v. *Review Commission,* 525 F. 2d 464, 467 (C.A. 2).

Construed to outlaw this
Consistent rule of government

III. THE SEVENTH AMENDMENT DOES NOT CONTROL THESE CASES BECAUSE CONGRESS HAS CONFIDED THEIR RESOLUTION TO AN EQUITABLE TRIBUNAL

We have thus far assumed that, because these cases involve the recovery of monetary penalties, they would be subject to the strictures of the Seventh Amendment, but for the fact that the government is a party, or the circumstance that Congress has assigned the fact-finding function to an administrative agency. There is, however, a wholly independent basis for denying trial by jury here: that to permit the intervention of a jury would dismember the specialized and essentially equitable scheme which Congress has prescribed for the enforcement of the Occupational Safety and Health Act.

1. This submission relies primarily on *Katchen* v. *Landy,* 382 U.S. 323. That decision (382 U.S. at 338–340) qualified the apparently sweeping rule laid down in *Beacon Theatres* v. *Westover, supra,* and *Dairy Queen* v. *Wood, supra,* that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances * * * can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' " 369 U.S. at 472–473. And *Katchen* itself has recently been reaffirmed. See *Curtis* v. *Loether, supra,* 415 U.S. at 194–195. The holding is that a bankruptcy court may exercise summary jurisdiction (without a jury) to determine the concededly legal issues of voidable preferences when passing on creditors' claims.

In reaching that result in *Katchen,* the Court repeatedly stressed the "specific statutory scheme" of the Bankruptcy Act, which "contemplat[ed] the prompt trial of a disputed claim without the intervention of a jury" in a forum essentially performing equitable functions. 382 U.S. at 327, 336–339. To require a separate proceeding before a jury on the issue, the Court concluded, would be "to dismember a scheme which Congress has prescribed." 382 U.S. at 339. We submit the same considerations govern here.

2. It is plain Congress created the Review Commission for the overriding equitable purpose of assuring the swift issuance of injunctions directing abatement of work-related hazards threatening employees. The Act's *raison d'etre* is abatement, not penalty assessments, which were included only to promote voluntary abatement by employers prior to inspection.[97] This has been recognized in the decided cases. See, *e.g., Brennan* v. *Winters Battery Mfg. Co., supra,* 531 F. 2d at 321–323; *Brennan* v. *Review Commission and Kesler & Sons Construction Co.,* 513 F. 2d 553 (C.A. 10); *Dunlop* v. *Haybuster Mfg. Co.,* 524 F. 2d 222 (C.A. 8).[98] The central importance of the abatement remedy

[97] See pp. 5–9, *supra.* As the House Committee noted (Leg. Hist. 853, 856), "The philosophy underlying [this reported bill] is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties, because even large ones can become mere license fees. * * * *Death and disability prevention is the primary intent of this bill.* Although possible penalties for violations may be an important deterrent, they are only a partial solution." [Emphasis added.]

[98] As the Third Circuit recently held in dismissing on failure-to-exhaust grounds an employer's attempt to block OSHA in-

is indicated, moreover, by the statutory presumption against suspension of abatement once an administrative abatement order issues. 29 U.S.C. 660(a).

The essentially equitable character of proceedings before the Commission is a consequence of the statutory scheme. The Act mandates abatement as part of the very language creating the citation process, but relegates accompanying penalties to an ancillary, subordinate, and largely discretionary role. Cf. 29 U.S.C. 658(a) and 659(a); 29 U.S.C. 666(a)–(d). It recognizes the special status of abatement orders by authorizing severe sanctions for failure to comply and creating a special proceeding by which employers can enlarge abatement periods without contesting the citation or penalty themselves. 29 U.S.C. 659(b) and (c), 666(d). It provides that petitions for appellate review of Commission orders "shall not * * * operate" to stay abatement, and authorizes summary judicial enforcement of abatement orders which have become final and non-reviewable. 29 U.S.C. 660 (a) and (b). It explicitly treats Commission proceedings as analogous to those seeking permanent injunctions, to which tem-

spection in the district court, the exhaustion doctrine "exemplifies judicial recognition of the autonomy of the executive branch, whose dominion the courts will not invade unless the agency has clearly exceeded its jurisdiction. * * * *Prior judicial intervention would * * * disrupt a statutory scheme which is designed to provide swift issuance of abatement orders to protect employees endangered by the conditions of their work.*" *Matter of Restland Memorial Park,* No. 75-2334, decided July 30, 1976, slip. op. 5, n. 14. (Emphasis added.) Cf. *Weinberger* v. *Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 653.

porary equitable relief through the district courts is a necessary adjunct. 29 U.S.C. 662. And the same emphasis is revealed in the legislative history. As Senator Javits stated in support of his successful floor amendment creating the Review Commission (Leg. Hist. 462):

> It creates a review commission which * * * will have the same type of authority that the Federal Trade Commission exercises: *The power to issue a cease and desist order,* which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals. * * * If the Secretary desires to enforce the order through the contempt power, similarly, he can go into court in order to get the Circuit Court * * * to enter an order for the specific purpose, and then that order can be enforced through the contempt powers of the Circuit Court * * *. [Emphasis added.][99]

3. Not only are proceedings under OSHA essentially equitable, but, as the Court found with respect to the Bankruptcy Act, here, too, Congress was very much concerned with expedition—which, of course, precluded plenary jury trials. And, what is more (unlike the bankruptcy situation), there was a deliberate policy of securing uniformity of decisions through a centralized agency—which, again, the intervention of a jury would tend to defeat.

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[99] See also, *e.g.*, Leg. Hist. 149–155, 172–173, 194–196, 297–298, 463, 470, 851–856, 991, 1191–1192. Significantly, in none of these key passages is the Commission's power to assess discretionary penalties treated as different from its power to enjoin violations. Nor, realistically speaking, could it be so separated. See *National Independent Coal Operators' Assoc.* v. *Kleppe*, *supra*, 423 U.S. at 401.

When we examine the legislative history, we discover that, despite intense Congressional concern for an appropriate fact-finder, juries were never even considered. In the Senate the crucial battle relating to the bill's passage was fought over whether the Secretary or an independent commission should be the adjudicator. *E.g.*, Leg. Hist. 155, 193–195, 199–201, 462. The reported Williams bill authorized the Secretary sitting as an administrative court to adjudicate contested citations and penalties subject to substantial-evidence review in the courts of appeals, Leg. Hist. 204, 256–259; the Javits floor amendment proposed an administrative tribunal operating under expedited procedures independent of the Labor Department. Leg. Hist. 381–393, 462–479. In support of his amendment, which was eventually adopted, Leg. Hist. 478–479, Senator Javits and others advanced as critical considerations the speed, predictable uniformity of decision, and greater appearance of fairness such a commission would afford. *E.g.*, Leg. Hist. 392–393, 462–464, 471–472.

The debate in the House was similarly over whether the Secretary or an independent commission should adjudicate violations and penalties. *E.g.*, Leg. Hist. 877–878. The reported Daniels bill provided fact-finding and penalty assessment by the Secretary subject to substantial-evidence review in the district courts, Leg. Hist. 837–838, 854; the Steiger substitute substantially mirrored the Javits amendment, was supported by similar arguments for expedition, fairness, certainty and expertise, and was overwhelmingly

adopted. Leg. Hist. 763, 786, 880, 988–991, 1069–1070, 1091, 1112. Significantly, no bill which was introduced in either house—let alone those reported and passed—proposed to vest fact-finding and penalty assessment in district courts or juries. The sense of the whole Congress was clearly that a centralized expert adjudicator was required.

That Congress rejected juries as fact-finders is unsurprising given its repeated emphasis on the related enforcement goals of speedy final abatement orders, expert determinations, and nationwide uniformity of both obligations and results. Leg. Hist. 144, 194–195, 462–471, 845, 854.[100] Those goals are basically incompatible with the delays and unpredictable *ad hoc* determinations of juries. As this Court has noted with respect to expertise alone, it is a concept "not consistent with the use * * * of a jury as fact-finder." *Curtis* v. *Loether, supra,* 415 U.S. at 194 n. 8, Cf. *Cox* v. *United States, supra,* 333 U.S. at 453.[101] Indeed, the

[100] See *Brennan* v. *Review Commission and Gordon Co.*, 492 F. 2d 1027, 1030 (C.A. 2).

[101] Contrary to petitioners' suggestion (Br., pp. 78–83), expertise does not relate solely to a fact-finder's ability to resolve isolated issues of fact—a proposition which would swallow the concept, since juries can resolve almost any factual issue treated by agencies. The concept more fundamentally relates to consistency of results and a familiarity with the statutory and policy matrix in which particular facts are found and are to be evaluated—considerations this Court has historically relied upon in determining that an agency has primary jurisdiction, see *Boston Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 69, and affirming Congress' authority to create such specialized tribunals. *E.g., Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 559–560. See *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1266–1267 (C.A. 4).

Court has invoked these considerations in rejecting even *non-jury* trial *de novo* of administrative determinations in a comparable context. What was said in *Weinberger* v. *Bentex Pharmaceuticals, Inc., supra,* 412 U.S. at 654, has even greater force against a claim of trial *de novo* with a jury:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure.

We conclude that affording jury trials at any stage of OSHA proceedings would "dismember the statutory scheme," *Katchen* v. *Landy, supra,* and is without "functional justification," *Curtis* v. *Loether, supra,* 415 U.S. at 195, whether they are afforded at initial hearing or after administrative proceedings are complete. Given the essentially equitable character of those proceedings, the Seventh Amendment does not require disruption of the careful legislative plan.[102]

[102] Petitioners assert (Br., pp. 83–85 and n. 37) that imposing a jury trial right on OSHA proceedings will not overcrowd district court dockets because more than 90 per cent of civil penalties imposed by agencies subject to *de novo* review are settled before they reach district court. The short answer is OSHA is currently issuing more than 100,000 citations annually, 5 per cent or 5,000 of which are contested—a figure which constitutes fully one-third of the administrative penalty cases reported by Professor Goldschmid for the entire Federal establishment in 1972, and threatens to

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General.

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place a large number of "additional cases in a [district court] system 'already being engulfed by a tidal wave of litigation.'" Goldschmid, *supra*, at 921, n. 41. More importantly, the assertion overlooks the fact that such settlement statistics are powerful evidence the regulatory system is being distorted by district court trials which neither agencies nor regulated parties in general possess sufficient resources to bear. As the Administrative Conference stated with respect to this very settlement statistic in recommending the elimination of *de novo* review (*Recommendation 72-6: Civil Money Penalties as a Sanction* (Adopted December 14, 1792), p. 2): "Settlements are not wrong *per se*, but the quality of the settlement under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether."

In short, the central concern is not that *de novo* proceedings would further congest court dockets, but that the drain of resources for such never-ending litigation would compromise enforcement. The Act covers nearly 65 million workers and 5 million workplaces. See The President's Report [To The Congress] On Occupational Safety And Health For 1973, pp. 57, 59 (G.P.O., 1975). The Secretary's current inspection force stands at less than 1,300, an increase of almost 1,000 from Fiscal 1972.

WILLIAM J. KILBERG,
Solicitor of Labor,
BENJAMIN W. MINTZ,
Associate Solicitor for Occupational Safety and Health,
MICHAEL H. LEVIN,
Counsel for Appellate Litigation,
JUDITH A. BURGHARDT,
Attorney,
Department of Labor.

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